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COMMERCIAL LAWS OF INDIA (Vol. II.)

THE LAW OF AGENCY

WITH
SPECIAL REFERENCE TO BRITISH INDIA

By
RAI SAHIB OM PRAKASH AGGARAWALA
M. A. ; P. C. S.

*Author of 'Compulsory Acquisition of Land in British India', 'Indian Sale
of Goods Act, 1930', 'Town Improvement Trusts in India', 'The Punjab
Land Revenue Act, The Punjab Tenancy Act; Customary
Law in the Punjab, etc., etc.*

with a foreword by
THE HON'BLE MR. JUSTICE G. D. KHOSLA
BAR-AT-LAW
I.C.S.
Judge of the High Court of Judicature at Lahore.

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FOREWORD

"The Law of Agency" is a worthy successor to the author's "Indian Sale of Goods Act" and Rai Sahib Om Parkash Aggarwal has attained the same high standard. The book will be welcomed by the members of the legal profession both as a book of reference and as a readable treatise on the Law of Agency in British India. The references to English Law on which our own Law of Contract is based point the way to the correct approach to this subject. The author has spared no pains in making his book as exhaustive as possible and the scheme of the work is calculated to facilitate ready reference.

April 5th, 1946.

G.D. Khosla.
(The Hon'ble Mr. Justice)
Bar-at-Law
I. C. S.
Judge of the High Court of
Judicature at Lahore.

PREFACE.

The Law of Agency is an important branch of the commercial laws of any country, and in India it forms Chapter X of the Indian Contract Act, 1872. This Act, however, does not profess to be a complete code dealing with the law relating to contracts and though the provisions of the Act so far as these stand, are exhaustive and imperative, we have to go beyond the Act for matters not covered by it. The Act also specifically saves any usage or custom of trade or any incident of any contract, not inconsistent with its provisions. The aim of the present work is to provide an analytical and critical study of this important branch of the law of contract, and to furnish as fully as possible a statement of the principles and rules relating thereto.

The Indian Contract Act was enacted after the principles of the English Common Law as they existed at the time, and although considerable changes seem to have occurred in the English Common Law since the enactment of the Indian Contract Act, most of the provisions of this Act remain unchanged. The law of agency as stated in the English text-books cannot therefore be accepted as applicable to India without properly sifting it. In this book the decisions of the English and other foreign Courts on the law of agency have been carefully examined before citing as authority. At the same time it is clear, as held by their Lordships of the Privy Council, that in the absence of any law or well established custom existing in India, English law would properly be resorted to in mercantile affairs, for principles and rules to guide the courts in this country to a right decision. Knowledge of the principles and rules of the English law relating to agency is therefore essential for proper study of the law as applicable in India, and where the Indian caselaw on the subject is meagre or not forthcoming and the rule is not clear from the plain meaning of the statute, use of the English case-law on the subject as illustrative of the general principles of the law will be of considerable help. In this work therefore there are frequent references to the English law and the decisions thereunder. There are references to the American law on the subject also. Commentators on legal subjects in India often quote from English and other foreign decisions without quoting the law under which those decisions were given with the result that it is not possible to examine such authority in its true perspective and to judge its value in deciding a case under the law as applicable in India. Care has been taken not to repeat this mistake here.

The present work forms the second volume of the series which I propose to write on the commercial laws of India. The first volume dealing with the Indian Sale of Goods Act, 1930, was first published in 1941, and was warmly received by the

legal public. Its second editon is already in the hands of my readers. In fact, the encouragement which I received by the success of that book has prompted me to write this book also. I, however, do not claim any originality in its preparation. A commentator's job is no more than to quote the relevant law, collect the various authorities and examine them, and arrange the whole matter under suitable headings and sub-headings, so as to provide an intelligent and easy reading of the subject. Members of the legal profession and those who have to administer law in any capacity deem it a great convenience if they can lay their hands in the shortest possible time on the law applicable to the case before them. There is a general complaint that books on commercial laws are dry and stiff. I have tried to deal with the law of agency in this book as fully as possible, and to make it read interesting. How far I have been successful in my attempt I leave it to my generous readers to judge. The caselaw quoted, both English and Indian is up to date, and the index is quite exhaustive and complete with cross references. A table of cases also has been added.

In the preparation of this book I have derived considerable help from Bowsead's Law of Agency, Katiar's Law of Agency; Pollock and Mulla's Indian Contract Act; Moitra's Indian Contract Act; Wright's Principal & Agent, Paterson's Law of Agency (Tagore Law Lectures) Story on Agency, Halsbury's Laws of England (Second Edition) and other standard works on the subject, and I gratefully acknowledge my indebtedness to the learned authors of these works. My thanks are also due to my younger brother Mr. B. Vira Gupta B.A. for preparing the table of cases and for seeing the book through the press.

I owe a debt of gratitude to the Hon'ble Mr Justice G. D. Khosla Bar-at-law I.C.S. Judge of the High Court of Judicature at Lahore for his kindness to go through the pages of this book and contribute a foreword.

I shall be grateful to my readers if they will favour me with their suggestions for the improvement of this work for subsequent editions.

New Delhi,
April 23rd; 1946.

OM PRAKASH

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THE LAW OF AGENCY

* IN BRITISH INDIA

CHAPTER I

1. Contractual obligations. 2. Agency. 3. Law of Agency.
4. English Law how far helpful in interpreting the Law of Agency in British India
5. History of the Law of Agency

INTRODUCTORY

1. Contractual obligations

‘The object of Law’, says Anson, “is Order, and the result of Order is that men are enabled to look ahead with some sort of security as to the future. Although human action cannot be reduced to the uniformities of nature, men have yet endeavoured to reproduce, by law, something approaching to this uniformity. As the law relating to property had its origin in the attempt to ensure that what a man has lawfully acquired he shall retain, so the law of contract is intended to ensure that what man has been led to expect shall come to pass; that what has been promised to him shall be performed.”¹ Pollock describes the Law of Contract as the endeavour of public authority, a more or less imperfect one by the nature of the case, to establish a positive sanction for the expectation of good faith which has grown up in the mutual dealings of men of average right-mindedness.²

Contract results from a combination of the two ideas of Agreement and Obligation. Contract is that form of Agreement which directly contemplates and creates an obligation; the contractual obligation is that form of obligation which springs from Agreement.³

Nature and
sources of
obligations

An obligation, in the language of jurisprudence, is the legal tie or *vinculum juris* (as the Roman lawyers called it), which connects two definite persons, A and B of whom A has a *right* that B shall do or refrain from doing something to, for, or on behalf of A; while B is under a corresponding *duty* to do or refrain from doing that something to, for, or on behalf of A. A's end of the tie we call a *right* (or strictly a *right in personam* in contrast with the rights in *rem*). B's end a *duty*; obligation covers both the right and the duty, considered together. The root idea is the *tying*.

The methods by which this legal bond comes into existence and connects the two parties are *mainly* two. (i) The first is the act of the parties themselves in agreeing together to create such an obligation between them, which in this case is called a contract. (ii) The second is the act of the law itself, either (a) by

1. Anson's *Law of Contract*, 16th Edn., pp.2, 3.
2. Pollock's *Principles of Contract*, 9th Edn., p. 1.
3. Anson, page 2.

imposing upon two parties, standing in certain mutual relationships arising independently of agreement an obligation analogous to a Contract, which is therefore said to arise from Quasi-contract (*quasi ex contractu* as the Roman lawyers called it), e.g., in certain cases an obligation to restore money paid in ignorance of fact; or (b) in fixing the general principles of civil (as opposed to criminal) liability for legal injury inflicted by one person upon another, apart from breach of contract and from Quasi-contract. Where, for instance, a right to property, to security, or to reputation has been violated by trespass, assault or defamation, the wrong doer is bound to the injured party to make good his breach of duty in such manner as is required by law. Such an obligation is not created by the free will of the parties, but springs up immediately on the occurrence of the wrongful act. Obligation may spring from agreement and yet be distinguishable from contract. Of this sort are the obligations incidental to such legal transactions as marriage or the creation of a trust.

Contract

Here we are concerned only with contractual obligations, that is, obligations arising out of contracts. A *contract* is an agreement between two or more persons resulting in one or more of them being legally bound to do or not to do something for or at the instance of the other or others, or in other words, it is *an agreement enforceable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.*¹

Agreement

What is an Agreement? Agreement as analysed by Savigny, is the expression by two or more persons of a common intention to affect their legal relations. But Agreement as thus defined has a wider meaning and includes transactions of other kinds than contract as we commonly use the term. There are Agreements the effect of which is concluded as soon as the parties thereto have expressed their common consent in such manner as the law requires. Such are conveyances and gifts, wherein the agreement of the parties effects at once a transfer of rights *in rem*, and leaves no outstanding obligation subsisting between them. There are agreements which effect their purpose immediately upon the expression of intention, but which differ from simple conveyance and gift in creating further outstanding obligations between the parties, and sometimes in providing for the coming into existence of other obligations, and those not between the original parties to the agreement. For instance, a settlement of property in trust; for persons born and unborn, effects much more than the mere conveyance of a legal estate to the trustee; it imposes on him incidental obligations some of which may not come into existence for a long time; it creates possibilities of obligation between him and persons who are not yet in existence. These obligations are the result of Agreement. Yet they are not Contract.

Contract differs from other forms of Agreement in having for its object the creation of an obligation between the parties

1. Anson p; 10; Cf. clause (b) of section 2 of the Indian Contract Act, 1872, which defines contract as an agreement enforceable by law.

to the Agreement. Its essential feature is a *promise* by one party to another, or by two parties to one another, to do or forbear from doing certain specified acts. By a promise we mean an accepted offer as opposed to an offer of a promise, or, as Austin called it, a *pollicitation*. To make that sort of agreement which results in contract, there must be (1) an offer, (2) an acceptance of the offer, resulting in a promise, and (3) the law must attach a binding force to the promise, so as to invest it with the character of a legal obligation. Or we may say that such an agreement consists in an expression of intention by one or both of two parties, of expectation by one or both wherein the law requires that the intention should be carried out according to the terms of its expression and the expectation thereby fulfilled.¹

2 Agency

The general rule that a person who is not a party to a contract cannot be included in the rights and liabilities which the contract creates—cannot sue or be sued upon it—is an integral part of our conception of contract. We have seen that a contract is an agreement between two or more persons, by which an obligation is created, and those persons are bound together thereby. If the obligation takes the form of a promise by A to X to confer a benefit upon M, the legal relations of M are unaffected by that obligation. He was not a party to the agreement; he was not bound by the *vinculum juris* which it created; the breach of that legal bond cannot affect the rights of a party who was never included in it. The operation of contract

Nor, again, can liability be imposed on M by agreement between A and X. In contract, as opposed to other forms of obligation, the restraint which is imposed on individual freedom is voluntarily created by those who are subject to it—it is the creature of agreement.²

But although A cannot by contract with X confer rights or impose liabilities upon M, yet A may represent M, in virtue of a contract of employment subsisting between them, so as to become his mouthpiece or medium of communication with X. This employment for the purpose of representation is the contract of agency. The Common Law rule as to agency is expressed in the maxim, *Qui per alium facit, per se ipsum facere* Agency

¹ Anson, p. 5

Clauses (a) to (e) of section 2 of the Indian Contract Act, 1872, define *agreement* as follows:—

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a *proposal*
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be *accepted*. A proposal when accepted becomes a *promise*.
- (c) The person making the proposal is called the "*promisor*" and the person accepting the proposal is called the "*promisee*"
- (d) When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a *consideration* for the promise
- (e) Every promise and every set of promises, forming the consideration for each other is an agreement.

² See Anson, p. 275

videtur,¹ "He who does an act through another is deemed in law to do it himself," or more shortly, *Qui facit per alium, facit per se* "He who acts by another acts by himself." The Common Law always allows one man to authorise another to contract for and to bind him by an authorised contract.²

Thus 'agency' is founded on a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which the other assumes to do the business and to render an account of it. The essence of the matter is that the principal authorises the agent to represent or act for him in bringing or to aid in bringing the principal into contractual relation with a third person.³

With the ever-increasing development of business, the necessity of understanding the Law of Principal and Agent becomes of greater importance. Large firms have agencies, not only in different places throughout the same country, but in every large town throughout the world. Indeed, by far the larger amount of business is carried on through agents of one kind or another, whether such agents are the managers of branch businesses, factors, brokers or commercial travellers. The master of every merchant vessel is his owner's agent, and has authority to represent him in matters connected with the ship.⁴

3. Law of Agency

The Law of Agency to be considered here is only a subdivision of the Law of Contract. Chapter X of the Indian Contract Act, 1872 (Act No. IX of 1872) deals with this branch. It will therefore be necessary to study the extent and scope of the Contract Act before proceeding to study the Law of Agency.

Contract Act
not exhaustive.

The Indian Contract Act does not profess to be a complete code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than define and amend certain parts of that law. No doubt it treats of particular contracts in separate chapters, but there is nothing to show that the legislature intended to deal exhaustively with any particular chapter or sub-division of the law relating to contracts.⁵

Their Lordships of the Privy Council observed in *Ramdass V. Amer Chand & Co.*⁶ "The Indian Contract Act recites the

1. Co. Litt. 258; Broom's Legal Maxims (8th Edn.) p. 639; Wharton's Law Lexicon (14th Edn.), p. 42.
2. See *R. v. Kent Justices* (1873), L. R. 8 Q. B. 305.
3. *Mohesh Chandra Basu v. Radha Kishore Bhattacharjee*, 12 C. W. N. 28.
4. See *Wright's 'Principal & Agent'* (2nd Edn.), p. 1.
5. *Irrawaddy Flotilla Co., v. Bhagwandass* 18 Cal. 620, 628, 629, cited in *Jwaladutt K. Pillani v. Bansilal Mohlal* 56 I. A. (1929) at p. 178. "The Act, so far as it goes, is exhaustive and imperative; *Promotha v. Prodymno*, 26 C. W. N. 772=1921 Cal. 416=69 I. C. 900, *Murariji Premji v. Mulji Ved & Co.*, 48 Bom. 20=1924. Bom. 232=77 I. C. 266; *Jagji Ram Daas v. King Hamilton & Co.*, 55 Bom. 677=1931 Bom. 337=134 I. C. 545; *Jwaladutt v. Bansilal*, 53 Bom. 414=33 C. W. N. 585 P.C.; *Mohori Bibee v. Dharmodas Ghose* (1903) L.R. 30 I. A. 114, 125; 30 Cal. 539, 548. *Gajanan Moreshwar v. Moreshwar Madan*, A. I. R. 1942 Bom. 302=44 Bom. L. R. 703=203 I. C. 261.
6. (1916) L. R. 43 I. A. 164, 170; 40 Bom. 630, 636.

expediency of defining and amending certain parts of the law relating to contracts. It is therefore an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law."

But so far as the Act goes it is exhaustive and imperative¹ and the natural meaning of the words of the statute should be followed uninfluenced by the previous state of the law. The rule for construing a codifying Act has been thus stated by Lord Herschell in *Bank of England v. Vagliano*² : "The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any consideration derived from the previous state of the law, and not start with enquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear interpretation in conformity with this view. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

As stated above, the Contract Act does not cover the whole field of contract law. What law will therefore govern the cases not provided for by the Contract Act or other legislative enactments relating to particular contracts?

What law applicable in cases not governed by the Contract Law?

The Contract Act is not retrospective in its operation.³ Previous to the passing of the Act, the charters of the eighteenth century which established Courts of Justice for the three presidency towns of Calcutta, Madras and Bombay, introduced into their jurisdiction the English common and statute law in force at the time so far as it was applicable to Indian circumstances. This indiscriminate application of English law to natives of India within the jurisdiction of the supreme courts led naturally to many inconveniences. To obviate this, the statute of 1781 (21 Geo. III C. 70, S. 17) empowered the court at Calcutta (being then the Supreme Court), and the statute of 1797 (37 Geo. III C. 142, S. 13) empowered the courts of Madras and Bombay (being then the Recorders' Courts) to determine all actions and suits against the inhabitants of the said towns

1. *Mohori Bibee v. Dharmodas*, 30 I. A. 114=30 Cal. 539, 548=7 O. W. N. 411, P. C.; *Salu V. Bajat*, 42 I. C. 200.

2. (1891) A. C. 107, 144-145.

3. *Onda V. Brojindro*, 12, B. L. R. 451, 458, 472.

provided that their succession and inheritance to lands, rents, and goods, and all matters of *contract* and dealing between party and party, should be determined in the case of Mahammadans by the laws and usages of Mohammadans, and in the case of Gentoos (Hindus) by the laws and usages of Gentoos, and where only one of the parties should be a Mohammadan or tentoo by the laws and usages of the defendant. The effect of these statutes was to supersede English law so far as regards Hindus and Mohammadans in the case of contracts and other matters enumerated in the statutes and to declare the right of Hindus and Mohammadans to their laws and usages.¹

In 1862 High Courts were established for each of the presidency towns of Calcutta, Madras, and Bombay, but the same personal law continued to be administered to Hindus and Mohammadans, and is administered to them even at the present day subject to legislative enactments. In matters of contract, therefore, the Hindu law of contract was in fact applied by the High courts in the exercise of their original jurisdiction to Hindus, and the Mohammadan law to Mohammadans, up to the passing of the Contract Act in 1872, although the Courts to which the statutes of 1781 and 1797 were applicable had been abolished. The preservation of this jurisdiction appears to be accounted for by the charters of the High Courts. Under these charters the position is that the High Courts have to administer the law as laid down in the Indian Contract Act, whether the parties to the suit be Hindus, Mohammadans, or otherwise,² but subject to that the High Courts are still bound in the exercise of their ordinary original civil jurisdiction, to apply the native law of contract to natives, that is Hindu law to Hindus and Mohammadan law to Mohammadans.³

As regards Mufassal Courts, it is provided that the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; and where no specific rule exists, according to "justice, equity and good conscience."⁴ The expression "justice, equity and good conscience" has been interpreted to mean the rules of English law so far as they are applicable to Indian society and circumstances.⁵

In conclusion therefore, it may be stated that in cases not provided for by the Contract Act or other legislative enactments relating to particular contracts, it is incumbent upon the High Courts, in the exercise of their original jurisdiction, to apply the Hindu law of contract to Hindus and the Mohammadan law of contract to Mohammadans, and in the case of other cases, in the absence of any specific rule, according to "justice, equity

1. Pollock and Mulla, *Indian Contract & specific Relief Acts*, 7th Edn. pp 1 to 3; see also *Rumiche v. Lokenath*, 5 Cal. 688.

2. See *Madhub Chander v. Rajcoomar Dass*, (1874) 14 B. L. R. 76.

3. Pollock & Mulla, p. 3 to 5.

4. Pollock and Mulla, p. 5.

5. *Waghela Rajsanji V. Shekh Masluddin*, L. R. 14 I. A. 89, 96; 11 Bom. 551, 561, *Dada v. Babaji* (1865) 2 B. H. C. 36, 38; *Webbe v. Lestar* (1865) 2 B. H. C. 52, 56, See also *Secy. of State v. Nilamekan*, 6 Mad. 406, 412; see also *Satia v. Kam*, 48 Cal. 388=59 I. C. 143=1921 Cal. 1; *Moselle Solomon v. Martin & Co.*, 62 Cal. 612=32 C. W. N. 461.

and good conscience." For all practical purposes, however, the native law of contract has been superseded by the Contract Act and other enactments relating to particular contracts.¹

The laws made by the Legislatures for the presidencies of Bengal, Madras, and Bombay, before the date of the Government of India Act of 1833 (3 and 4 Will. IV. C. 85) were known as "Regulations." The statute of 1833 established a legislature for the whole of British India, and the laws made under that statute, and the subsequent enactments modifying that statute, are known as "Acts". A major part of the Regulations has been repealed by subsequent Indian legislation.

Acts and Regulations not expressly repealed

Section 1 of the Contract Act states that nothing contained in that Act shall affect the provisions of any statute, Act or Regulation not hereby expressly repealed. Among the Acts relating to particular contracts and not expressly repealed by the Contract Act may be mentioned the following: Act XXXII of 1839 (Interest); Act XXVII of 1855 (Usury); Act IX of 1856 (Bills of Lading); Act XIII of 1859 (Workman's Breach of Contract—now repealed); the Merchant Shipping Acts (English) of 1854 and 1859, Act III of 1865 (Common Carriers) and the Policies of Insurance Assignment Act, 1866 (now repealed). The Acts enumerated above were passed before the enactment of the Contract Act. Among the Acts dealing with particular contracts and passed after that date may be noted the Negotiable Instruments Act, XXVI of 1881; the Transfer of Property Act IV of 1882; Merchant Shipping Act, 1883 (now repealed), the Indian Emigration Act, 1883 (now repealed), and the Indian Railways Act, 1890.²

It has been held that the general provisions of the Contract Act cannot supersede the provisions of a special later enactment such as the Bombay Hereditary Offices Act.³

Section 1 of the Contract Act also states that nothing contained in that Act shall affect any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act. The words "not inconsistent with the provisions of this Act" are not to be connected with the clause "nor any usage or custom of trade." Both the reason of the thing and the grammatical construction of the section require that the words "not inconsistent with the provisions of this Act" should not be connected with the clause "nor any usage or custom of trade", and apply only to the immediately preceding words "nor any incident of any contract."⁴ Hence mercantile usages are expressly saved from the operation of the Contract Act,⁵ and it is open to a party to

saving of usage or custom of trade, etc.

1. Pollock & Mulla, pp. 7 to 9.

2. See Pollock and Mulla, p. 8

3. *Lingu Rooyi V. Secy. of State*, 1923 Bom 201 = 111 I. C. 278.

4. *Irrawaddy Flotilla Co. V. Bhagwandas* (1891) L. R. 18 I. A. 121 127, 18 Cal 620, 627. For the contrary view see *Kuwerji V. The Great Indian Peninsula Railway Co.* (1878) 3 Bom 109, 113, *Moothara Kant Shau V. The Indian General Steam Navigation Co.* (1883) 10 Cal 166, 185. Both these cases were, however, considered by the Judicial Committee of the Privy Council in *Irrawaddy Flotilla Co. V. Bhagwandas* referred to

5. *Raja Dattaji V. Puran*, 1927 Nag 89 = 98 I. C. 759

plead a trade usage in conflict with the provisions of the Act. Thus in India, a trade usage inconsistent with the terms of the Contract Act, *e. g.* permitting an agent to trade in his own account in the business of the agency without the knowledge and the consent of the principal, may be valid if specially proved.² When an agent by the trade usage sells goods, the question whether he is authorised to do so is not governed by the provisions of the Act.³

As already observed, where there is no question of usage or custom of trade, an incident of a contract inconsistent with the provisions of the Act cannot be enforced.⁴

4. English law how far helpful in interpreting the Law of Agency in British India

As noted above, the Contract Act alone cannot be looked at as supplying the whole law of Agency in British India, even so far as contracts relating to that law are concerned; and it is further clear that it can in no way touch upon the law of Torts as applicable to the law of Principal and Agent.⁵

In the case of *Mollwo March and Co., The Court of Wards*⁶ their Lordships of the Privy Council held that in the absence of any law or well established custom existing in India on the subject of the law of partnership, English law would properly be resorted to, in mercantile affairs, for principles and rules to guide the court in this country to a right decision; but that, although this is so, it should be observed that in applying these principles and rules, the usages of trade, and habit of business of the people of India, so far as they may be peculiar and differ from those in England, ought to be borne in mind. This remark appears to be equally applicable to other branches of the law than that of partnership. It is therefore clear that where no assistance can be had from the Contract Act or other enactment of the Indian Statute book, and where no custom or usage is to be found, the Common Law of England and the law as formerly administered in the Courts of Chancery in England may be made use of to guide us in India to the law relating to Agency. Further, where the Indian case-law on the subject is meagre or not forthcoming, use of the English case-law on the subject as illustrative of the general principles of the law of Agency will be of considerable help.

5. History of the Law of Agency

Among the Romans as well as among the Hindus and Mohammadans the principle of representation seems to have been recognised very early. In Roman Law the same idea of representation is found in the maxim *Qui facit per alium facit per se* which has already even referred to.⁷ Narada says:

1. *Sital Prasad V. Ranyst*, 1931 All. 583=1931 A. L. J. 390.

2. *Jankidas Banarsidas V. Dumanimal* 37 I. C. 241=105 L. R. 86

3. *Saligram V. Nathamal*, 1933 Lah. 183=145 I. C. 188.

4. *Chitgupp V. Vinayak*, 45 Bom. 157=58 I. C. 184=1921 Bom. 164.

5. See the 'Statement of Objects and Reasons' for the Bill (Indian Contract Bill) Published in Gazette of India, 1867, Extraordinary, dated 6th July, 1866, p. 34; also remarks of Prinsep J. in *moothoora Kuntshaw V. India General St. Nar. Co.*, I. L. R. 10 Cal. (193)

6. 10 B. L. R. 312; L. R.

7. See page 4

"If a person employs another in an undertaking, whatever is done by the latter shall be binding on the former."¹ This maxim of representation finds its confirmation in earlier as well as later Smritis.² According to Vrahaspati an act of the agent, whether it tends to profit or loss, expenditure or income, must be accepted by his principal binding, and he must not quarrel with it whether in or outside the country.³ Manu admits the agency of necessity when an act of necessity is performed by the minor members of the family in the absence of the *karta* of the family and ordains the latter to ratify it. India which enjoyed a monopoly of trade in the west for a considerable period was familiar with such institutions of agency as factorship and stewardship from very early times. Indian commerce had its sway amongst the then rising nations of the world when most of the western countries were still backward in this direction. Indian merchant class is still perhaps more familiar with *Arhtias* and *Gumashtas* than those in the west. Rules which governed these relations formed part of the customary Law Merchant and as explained above, were administered by the courts of justice until they were incorporated *mutatis mutandis* in the Indian Contract Act of 1872.

"The early Roman law of Contracts", says Mr. Hunter, was absolutely destitute of the notion of agency."⁴ Blackstone treated the agents as only a superior kind of servants when he said : "There is yet a fourth species of servants, if they may be so called, being rather in a superior ministerial capacity, such as stewards, factors and bailiffs, whom however law treats as servants *pro tempore* with regard to such of their acts as affect their masters, or employer's property."⁵ Professor Hammond observes : "The Law of 'Principal and Agent' is derived from the canon law, and has only been introduced into the common law in recent times. If the older books of English Law are examined no such word as 'principal and agent' will be found in them. Wherever any question is discussed which would now be treated under that head, it is treated as master and servant. 'Principal and agent' does not occur in Viner's abridgement, or those preceding it, and it is only at the end of the eighteenth century that we find it beginning to appear as a separate title, as yet of very limited application."⁶

The words 'Agency' and 'Agent' both are derived from the Latin words *ago, agen, agens, agentis*, meaning an actor, a doer, a force that accomplishes a thing, a generator, a producer"⁷ They are synonymous in these sense where an impersonal agent or agency is meant. But where the word 'agent' is used in the sense of 'one person' acting for another, *i. e.*, in the personal sense, it is to be distinguished from "Agency" in as much as the word 'agent' denotes here, 'the person acting' and the word

1 Narada, quoted in Sen's *Hindu Jurisprudence*, p. 338

2 Vrahaspati and Manu quoted by Sen in his *Hindu Jurisprudence*, p. 334

3 *Ibid.*

4 Hunter's *Roman Law*.

5 Blackstone's Commentaries, Vol I, p 427.

6 Hammond's, Blackstone, Book I, p 719, See also. Common Law by Holmes J p 228

7 Mechem, § 1

'agency' mere status or relation between 'the person acting' and 'the person for whom he so acts.'¹

Theory of
Confidence
and Agency.

"Germ of agency" say Pollock and Maitland, "is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the use, trust or confidence." According to them, in olden times, a person did not receive money or chattels 'as agent for another' but only to the 'use of such other.' Confidence formed the basis of the representation in ancient times; it forms the basis of it in modern times as well. In fact, reliance upon the agent's integrity, fidelity and capacity is the moving consideration in the creation of all agencies; in some it is so much the inspiring spirit, that the law looks with jealous eye upon this manner of their execution and condemns not only as invalid as to the principle, but as repugnant to the public policy, everything which tends to destroy that reliance.

Accordingly, it was held that reposing of the confidence by the principal in the agent is sufficient consideration for the contract of agency, no other consideration being necessary.² The agent is bound to account for the money or chattel entrusted to him or coming in his possession as such on behalf of the principal and he cannot plead that the contract of service he was then required to render was without consideration.

Confidence is the distinguishing feature between agent and an ordinary servant as well. The power to exercise his own discretion given to an agent is only a necessary result of this confidence and varies with it. The greater the confidence reposed the greater is the power which the agent can wield. An ordinary servant has, generally, no discretion and must only do what his master orders him to do, and in the same way and to the same extent as he is ordered. As soon as confidence is reposed in his integrity, fidelity and capacity and he is given some discretion in the doing of the act he is ordered to do, his position changes from an ordinary servant to that of an agent holding him responsible to the extent he was confided in.

Agent how-
ever not a
trustee.

On the other hand, although agency is a relation of trust and confidence and property in the hand of an agent is impressed with trust for the benefit of the principal, yet the positions of a trustee and an agent are not identical. A trust involves full control of property. In this matter the trustee can exercise his discretion to the fullest extent and his power to exercise it cannot be questioned. An agency may be totally disconnected with any particular property. Even when an agent holds some property, he holds it, although as a trustee in this respect that he cannot use it for his own benefit, yet his control over such property is not complete but varies from time to time according to the directions of the principal and his discretion, therefore, is limited and is controlled by such directions.

A trustee holds legal title as regards property which forms the subject matter of trust and can sue and be sued as owner

1. Mechem, S. 1.

2. See J. C. A. S. 185.

thereof while an agent has usually no title at all in the property which comes in his possession as agent but holds it only on behalf of the principal and, therefore, he cannot sue or be sued in his own name but in the name of his principal alone. A trustee acts in his own name, while an agent acts usually in the name of his principal.

Again, a trust is not necessarily a contractual relation while an agency is always created by a contract express or implied, and is controlled by it. A trust is usually irrevocable; on the other hand an agency is usually revocable.

Here also, all these distinctions are due to the fact that the confidence reposed in an agent is of a limited nature. In fact, the position of an agent covers the whole range that lies between a servant and a trustee. He is not a mere servant in as much as he has at least some amount of confidence reposed in him which entitles him to exercise his own discretion to that extent. He is not a trustee because the confidence reposed in him is not full vesting him with a legal title in the property, but even limited legal title and some times even control of property being withheld by the principal himself which casts upon the agent a duty to follow his directions. Expressed mathematically we can say that the confidence reposed in the servant is zero while that reposed in a trustee is an unit and all the fractions of an unit lying between zero and one cover the agencies of all sorts.¹

As confidence governs the relation of principal and agent *inter se*, so the principle of estoppel governs their relation with third parties. This follows from the maxim *Qui facit per alium, facit per se*, that is, he who does a thing through another does it himself. These two principles, namely the principle of trust and confidence and that of estoppel govern the different incidents of these relations and these will form the subject of succeeding pages.

Principle of
estoppel in
relation to
third parties.

¹ See Katia's *Law of Agency in British India* pp 5 to 7

CHAPTER II.

PRINCIPAL & AGENT

6. "Principal and "Agent"—definition. 7. An agent distinguished from an ordinary servant. 8. An agent distinguished from an independent contractor. 9. An agent distinguished from a trustee. 10. An agent to buy or sell distinguished from vendor or purchaser. 11. Agency distinguished from partnership. 12. Agent distinguished from arbitrator. 13. Agency distinguished from other possessory rights. 14. Agent advancing money in the business of agency distinguished from a mere creditor. 15. An agent distinguished from a mere messenger or a person used merely as a mechanical aid or instrument. 16. Nomenclature of parties no conclusive evidence of relationship—actual facts must be looked into. 17. Held to be agents.

6. "Principal" and "Agent"—definition.

An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal."¹

(S. 182, Indian Contract Act, 1872).

Three parties

The definition of an 'agent' covers a person employed to do any act for another or to represent another in dealings with third persons. In every transaction of agency therefore there are always three parties involved, namely, the agent or the person acting for or representing another, the principal or the person represented or acted for and a third party or one to whom such representation is made. It is difficult to conceive of an act of an agent which does not involve these three parties.² The phrase 'in dealings with third persons' in section 182 of the Contract Act applies to both phrases namely 'to do any act for another' and 'to represent another.' The mere fact that a person is employed to do an act for another does not make the former an agent for the latter. Herein lies the distinction between an agent and an ordinary servant. A person who is employed merely to do an act for another not connected with any dealings with third persons is only a servant and not an agent, as we shall presently see.³

Representing
or acting for
another.

Agency is founded on a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name or on his account and by which the other assumes to do the business and

1. This follows the English law—"An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal"—*Bowstead on Agency*, 9th Edn., p. 2. Story's definition is rather too wide. He says: "In common language he who being competent and *sui juris* to do an act for his own benefit, or on his own account, employs another person to do it, is called the principal constituent or employer, and he who is thus employed is called the agent, attorney, proxy, or delegate of the principal constituent or employer. The relation thus created between the two parties, viz., the principal and the agent, is termed agency. The power thus delegated is called in law an authority."—*Story on Agency*, §. 3. This definition would include the whole law of master and servant also. See *Wrights' Principal & Agent*, 2nd Edn., p. 1.
2. Per Brett J. in *Robinson v. Mollett*, 7 Eng. Ir. App. 802.
3. Mechem, Paras. 2 and 3.

to render an account of it.¹ The essence of the matter is that the principal authorises the agent to represent or act for him in bringing to or to aid in bringing the principal into contractual relation with a third person. Therefore a person does not become an agent on behalf of another merely because he gives him advice in matters of business.² Similarly, a mere settlement of the terms of remuneration does not constitute a contract of agency unless an authority to act is conferred and accepted.³ A person selling his own property or goods cannot be acting as an agent, because there is no third party with whom he brings his employer into legal relations.⁴

In legal phraseology, every person who acts for another is not an agent. A domestic servant renders to his master a personal service; a person may till another's field or tend his flocks or work in his shop or factory or mine or may be employed upon his roads or ways; one may act for another in aiding in the performance of his legal or contractual obligations to third persons, as when he serves a public carrier, warehouseman, or mukeeper in performance of the latter's duties to the public. In none of these capacities he is an "agent" within the above meaning *as he is not acting for another in dealings with third persons*. It is only when he acts as representative of the other in business negotiations, that is to say, in the creation, modification, or termination of contractual obligations between that other and the third persons, that he is an "agent." *Representation of another in business negotiations with third persons so as to bind such other by his own acts as if they were done by the former, is of the essence of the relation of agency* and the distinguishing feature between an 'agent' and other persons who act for another. Looked from this point of view, an agency is a contract of employment for the purpose of bringing another in legal relations with a third party,⁵ or in other words, the contract between the principal and agent is primarily a contract of employment to bring him into legal relation with a third party or to contract such business as may be going on between him and the third party.⁶

An agent is thus a person either actually or by law held to be authorised and employed by any person to bring him into contractual or other legal relations with a third party.⁷ He is a representative vested with authority, real or ostensible, to create voluntary primary obligations for his principal by making promises or representations to third persons calculated to induce them to change their legal relations.⁸ Representative character and derivative authority may briefly be said to be the distinguishing features of an agent.⁹

1. Kent's Commentaries, vol. II, p. 784.

2. *Moresh Chandra v. Radha Kshore*, 12 C. W. N. 28.

3. *Vishnji Gordhandas v. Jaujraj*, 50 I. C. 146.

4. *Shipway v. Broadwood* (1899) 1 Q. B. 369.

5. See Wright on *Principal & Agent*, p. 3.

Wright suggests the following definition of "agent": "A person either actually or by law held to be authorised and employed by one person to bring him into contractual or other legal relations with a third party."—p. 3.

6. *Ibid*, page 4.

7. *Ibid*.

8. Hufent on Agency (2nd Edn), p. 17.

9. *Walton v. Dare*, 113 Jowa 1.

In a Calcutta case¹ the view has been expressed that the definition in S. 182 is wider than that of English law, under which no one can become the agent of another except by the will of that other²; and that the Indian definition did not require that the employment should be by the person for whom the agent is employed to act or whom he is employed to represent. The case was one in which a common manager had been appointed by the District Judge under the Bengal Tenancy Act, 1885, S. 95, and the court was of opinion that the definition in S. 182 applied to him. On this proposition it is observed in the 7th edition of Pollock and Mulla's Indian Contract and Specific Relief Acts (p. 530) :

"It is submitted that this is a very doubtful proposition of law, nor does it seem to have been necessary so to hold for the purposes of the case. A statutory manager so appointed occupies a position analogous to a receiver appointed by the court, who is the agent of the court alone; and S. 183 of the contract Act seems clearly to show that this part of the Act is concerned only with agents who become such by the volition of the principal who appoints them."

7. An agent distinguished from an ordinary servant.

"The distinction between a servant and an agent" says Holmes J., "is the distinction between serving and acting for." In the words of Professor Dwight, "the great and fundamental distinction between a servant and an agent is that the former is principally employed, to act for the employer, not resulting in a contract between the master and a third person, while the main effect of an agent is to make such a contract³ "Servants", he says, "may make contract incidentally while agents may in the same way render service; the principal distinction between them, however, is as above stated. Professor Huffent explains the distinction thus:

"The primary distinction between representation through an agent and representation through a servant lies in the nature of the act which the representative is authorised to perform. An agent represents his principal in an act intended or calculated to result in the creation of a voluntary primary obligation or undertaking. A servant represents his master in the performance of an operative or mechanical act of service not resulting in the creation of a voluntary primary obligation, but which may result, intentionally or inadvertently, in the breach of an existing one. An agent makes offers, representations or promises upon the strength of which third persons change their legal relation or position. A servant performs operative acts not intended to induce third persons to change their legal relations. An agent has to take account of the mind and will of two persons, namely, of his principal whose mind he represents and of the third person whose mind he seeks to influence. A servant has to take account of the mind and will of one person

1. *Sukumari Gupta v Dharendra Nath*, 1941 Cal. 643=197 I C 869.

2. *Pole v. Leask* (1863) 33 L J Ch. 155 ; 8 L T 645, H L

3. Dwight's '*Persons and Personal property*,' p. 323.

only, namely of his master whose existing obligations and duties he is to perform. In representation through an agent there are always three persons involved; the principal, the agent and the third person. In representation through a servant there are only two persons primarily involved, the master and the servant, and the third person is introduced only when the servant commits, in the course of his master's business, a breach of the obligations owing by the master to a third person. In the first case there are three persons and the third is induced to act. In the second case there are three persons and the third is acted upon.¹

Take the case of a porter on a sleeping car. He comes in contact with third persons. He assists passengers and looks out for their comfort and convenience. The essence of his duty is to render service for his employer to the passengers but he has neither power nor occasion to make contracts with them. He is therefore a servant and not an 'agent'

Now consider the case of a conductor. His sole duty may consist in managing the train and performing the ministerial act of collecting tickets, without any power to make contracts for carriage or binding his employer in any other manner in a contractual relationship with a third person. He is purely a servant and not 'an agent.' On the other hand, he may be authorized not only to manage his train but to make contracts for carriage as well. Then he is also an agent.²

It has been observed that an agent is usually vested with more or less of discretion as to the time and manner of acting while a servant is commonly required to act according to the directions of his master.³ Taken by itself, this is, however, not an important point of distinction. One may limit his broker to sales and purchases at a particular place, time or amount; nevertheless the broker would everywhere be regarded as an agent in spite of such limitations. A gardener, on the other hand, would every where be regarded as a servant although we may give to him the utmost discretion as to how or when or where or what he shall plant or cultivate or gather.⁴

An agent may have, and often has, in fact, a large discretion, but he is bound in law to follow the principal's instructions provided they do not involve anything unlawful. To this extent an agent may be considered as a superior kind of servant, and a servant who is entrusted with any dealing with third persons on his master's behalf is to that extent an agent. But a servant may be wholly without authority to do anything as an agent, and agency, in the case of partners, even an extensive agency, may exist without any contract of hiring and service.

Prisoner. who kept a refreshment house, was employed by the prosecutors to get orders for their goods, collect the money and pay it over. He was paid by commission. He was to go

1. *Huffert on Agency* (2nd Edn.) §. 4 See also *Merina v. Thomas*, 103 Va. 24.

2. *Per Field J in Chicago & C. Ry. Co. v. Ross*, 112 U. S. 377 (390) *Mechem*, para 36, foot-note 11.

3. See *Mc. Croskey v. Hamilton*, 108 Ga 640 ; *Bathmore v. Post*. 122 pa. 579.

4. *Mechem* §. 27.

about among farmers to get orders, but no definite time was to be spent in so doing. He was styled by them their agents for the particular district. The prosecutors had a store at B, under control of prisoner, who supplied customers from the stores pursuant to orders he obtained. In order to obtain the security of a guarantee society for prisoner's conduct and in compliance with their regulations, it was arranged that prosecutors should pay prisoner a salary of £ 1 a year. Prisoner having got into arrear was treated by prosecutors as a debtor for the amount. Prisoner fraudulently appropriated money which he received from customers and gave a false account. *Held*, that a conviction for embezzlement could not be sustained as the above facts did not establish that prisoner was servant of prosecutors, their relation being rather that of principal and agent.¹

The name of defendants, a Scotch firm of manufacturers, was put up outside M's office and the address of M's office was placed at the top of defendants' notepaper as being the address of their London offices. M was only employed by defendants as their agent for the special purpose of procuring and forwarding to them specifications and drawings as instructed by them from time to time; they paid him no wages, nor any rent for his office; they did not manufacture, or sell, or exhibit any goods at his office and he had no authority to take orders for them. It was held that (1) M was agent, and not servant, of defendants and (2) defendants were not carrying on business at his office within R. S. C. O. 9, r. 6.²

An agreement whereby the owner of property appoints another as his agent for a period of the three years to effect the sale thereof in consideration of a commission and expenses is a contract of agency and not a hiring of services.³

8. An agent distinguished from an independent contractor.

The difference between an agent and an independent contractor is, that an agent is bound to act in the matter of the agency subject to the directions and control of the principal, whereas an independent contractor merely undertakes to perform certain specified work, or produce a certain specified result, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract.⁴ An independent contractor exercises independent employment, in the course of which he undertakes, applying his own materials, servants and equipment to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means by which he accomplishes it.⁵ He is not the servant of the employer in as much as he is at liberty in general to choose his own

1. *R v Walker* (1858), Dears & B. 600=6 W. B. 505=27 L. J. M. C. 207.

1 English & Empire Digest, 271.

2. *Baillie v. Goodwin*, (1886), 33 Ch. D. 604=34 W. R. 787=55 L. J. Ch. 849
1 Digest 271.

3. *Hudon v. Coul* (1912), 42 Q. S. C. 228 (Canada); 1 Digest 271

4. Rowstead, p. 2, foot-note (a) and the cases cited therein

5. Mechem, para 40

means and methods and is not subject to the control of the employer as to the manner in which the work is to be done. He is not an agent merely because he executes the work for his employer as he has no authority to bind his employer in any form of contractual dealings with any third person.¹

The fact that the work is to be done in accordance with plans and specifications prescribed by the employer² or to his satisfaction³ or that the contract provides that the work shall be done under the instructions or directions of the employer or his agent⁴ or that the employer reserves the right either in person or by agent to oversee or inspect the work during its progress for the purpose of assuring himself that the contract is being performed,⁵ or that he reserves the right to reject improper materials,⁶ or to insist upon the contractor's discharging unfit servants whom he may have employed⁷ or to terminate if not properly performed,⁸ do not effect any change in the status of an independent contractor as these are only precautions which he reserves for assuring himself that the desired end will be accomplished and in no way affect his status.⁹

The relation of master and servant will be established where the employer goes further than this and reserves to himself the right to control the actual performance of the work. This may further grow into that of the principal and agent if the employer is authorised also to enter into contractual relations with other persons on his employer's behalf and to exercise some degree of discretion in his dealings with such other persons.

Where a loaded vessel just leaving port was found on fire and the master employed a company who were doing business as shipping merchants, to take charge of her and rescue her cargo, it was held that the position of the company thus employed was not that of an agent but only of an independent contractor.¹⁰ Similarly, where a state made a contract with publisher to stenotype and print certain state reports, the publisher was held to be an independent contractor and not an agent of the state.¹¹ Where a lumber company induced a physician to locate at its plant and undertook to collect for him certain sums from its employees monthly, the court held it to be an absolute contract on the part of the company to pay him

1. *Mechem* para 40

2. *Crenshaw v. Ullman* 113, Mo 633, *Heighes v. Ottau Ry Co.*, 396 Lio Th 461

3. *Klides v. Mackie*, 178 Mass 1, *Powell v. Virginia Construction Co.* 88, Tenn, 692, *Smith v. Milwaukee Builders Exchange*, 91 Wis. 369

4. *Harding v. Boston*, 163 Mass 14, *Norwalk, Co v. Norwalk*, 83 Comr 495, *Foster v. Chicago*, 96 Ill, App 4 confirmed in 97 Ill, App 264, *Frasse v. Mc Donald*, 122 Cal 400, *Ridgway v. Downing*, 109 Ga 591.

5. *St. Louis Ry Co. v. Knott*, 58 Ark 424, *Green v. Soule*, 145 Cal 96; *Harrison v. Kaiser*, 79 Ga 588, *Boyd v. Chicago Ry. Co.*, 217 Ill, 332.

6. *Fitzpatrick v. Chicago Ry. Co* 31 Ill App 64⁹, *Uplington v. New York*, 165 N. Y. 232 Per Rugby J in *Handaker v. Idle Dist. Council*, 1 Q B 335.

7. *Reedie v. London Electric Ry Co.*, 4 Ex 254

8. *Salberg v. Schlosser*, 20 N Dak, 307.

9. *Mechem*, § 1871

10. *Horan v. Strachan*, 86 Ga 408

11. *State v. State Journal Co.*, 75 Neb 275

those sums and not merely an undertaking as an agent to collect and pay over to him.¹

Public instrumentalities like railways, post, telegraph, etc. when employed in their ordinary capacity as such are usually regarded rather as a sort of independent contractor than as agents or servants whom the principal may direct and control and for whose acts or defaults he is responsible.² But some of them may undertake to act as agents as well. For instance, express companies often undertake to purchase, or sell goods, as well as to carry them or to collect money as well as to transmit it. Banks often undertake to act as agent but whether their position in receiving cheques, notes, drafts etc for collection is that of an agent or an independent contractor is a disputed point on which the authorities are by no means unanimous.³

A person may be an independent contractor in respect of some transactions and an agent in respect of others. For instance, a transfer company employed to receive goods from a carrier may be an independent contractor as to the transportation of them, but it may also be an agent so far as to charge the employer with a notice as to the condition of goods.⁴

It is also to be observed that the mode of payment by the employer to an independent contractor is not a sure test of his status though it may not be without significance. Ordinarily the independent contractor is paid by the job, that is a fixed sum for accomplishing a certain result but he may be paid in accordance with some unit of measurement,⁵ and the fact that he is paid by the day, week, or month is not of itself enough to destroy his standing as an independent contractor.⁶

Defendant, a landowner, contracted with a company for drainage of his estate and it was agreed that plaintiff (his steward) should, at a fixed sum, execute the same as the company's agent. The sum agreed upon had, after completion of the works, been paid by the company to defendant. Plaintiff claimed from defendant the profits on the works, being the difference between what the works had cost out of pocket, and what had been charged for them, on the ground that he was in the position of an ordinary contractor. *Held*:—(1) although on the face of the deeds executed plaintiff appeared to be an ordinary contractor, in reality he acted solely as defendant's agent, the arrangement being merely a contrivance by the company to allow a landowner to execute drainage works under superintendence of his own agent; (2) the claim could not be allowed.⁷

In the case of the *City Bank v. Barroic*⁸, it was contended

1. *Texas Lumber Co. v. Leonard*, 47 Tex Civil App 116 See also *Mekenna v. Stayman Manufacturing Co.*, 112 N Y. Supp. 1099

2. *Mechem*, §. 41

3. *Ibid.*

4. *Rothchild v. Great Northern Railway Co.*, 68 Wash 527

5. *Pink v. Missouri Furnace Co.* 82 Mo 276, *Ferguson v. Hukball*, 97, N Y. 507; *Mechem*, § 1871

6. *Mechem*, 1871.

7. *Waters v. Shaftsbury* (Earl) 1867, 2 Ch App 231—15 L T 849=15 W. R. 289 C. A.

8. (1880), 5 App cas. 664

that a tanner who received hides to tan and then arranged for the freight of them back was an agent. The House of Lords held that he was not, but a person doing work on the hides as an independent contractor.

9. An agent distinguished from a trustee.

A reference has already been made to the distinction between a trustee and an agent.¹ An agency always arises by contract express or implied, while a trust is not necessarily a contractual relation. A broad distinction is that a trustee may act in his own name while an agent acts regularly in the name of his principal. A trust does not necessarily or even usually involve any authority to enter into contracts which shall bind another, while the authority to make such contracts is the distinguishing characteristic of agency.

There are many ways in which a question to distinguish between the two relations may crop up, but the most common of them is where the person, who may be either *cestui que trust* or principal, is allowed to be liable upon contracts made by another person who may be either agent or trustee. If the person who made the contract is a trustee he binds himself and not the *cestui que trust*.² If on the other hand, the so-called trustee is a mere nominee or dummy put forward for no other purpose but to screen *cestui que trust* from responsibility the relation between them is that of principal and agent and the principal is liable.³ Where the person is trustee it is held that the rule exempting an agent who has, before notice, paid over to his principal money voluntarily paid to him by mistake, does not apply and he is liable to refund it in spite of the fact that he has paid it over to his *cestui que trust*.⁴ Questions arising in this question are often difficult and the relevant facts must be sifted very carefully before coming to a conclusion as to true status.⁵

In certain circumstances an agent may be placed in a position closely analogous to that of a trustee and the rules applicable to a trustee may then be applicable to him. The test is whether the agent is entrusted with funds of his principal for the purpose of their being employed in a particular manner, which it is his duty to keep distinct and separate from his own moneys. If he then makes use of them for any other purposes than those to which he has instructions to apply them, his liability is that of a trustee. If, on the other hand, he is not bound to keep the money separate but is entitled to mix it with his own money and deal with it as he pleases, and when

1. See page 10.

2. *Chaffee v. Rutland Railroad Co.*, 53 Vt. 34; *Kierett v. Drew*, 129 Mass. 150, *Shepard v. Abbott* 179 Mass. 300;

A *cestui qui trust* is not an agent of the trustee even in the case of a bare trustee *Stail v. Fenner*, 107 L.T. 120; *Churchward & Blight v. Ford*, 2 H. & N. 446.

3. See Article on "Trusteeship and agency" in *Law Quarterly Review*, p. 220 citing *inter alia* *Cor's* case 4 De G. J. & S. 53; *Pugh & Sharman's* case L.R. 13 Eq. 566; see also *Conventry's* case 1 Ch. 202.

4. *Mechem* 43, *Eoot-pote* 3 (1) citing *Cleghom v. Castle* 13 Hawaiian 186.

5. *Mechem*, §. 43

called upon to hand over an equivalent sum of money, then he is not a trustee of the money but merely a debtor.¹

In an English case reported as *Margetts v. Perks*², A and B, trustees of a will under which the plaintiff was entitled to a share of residue, which she had assigned to C and D, the trustees of her marriage settlement, paid it to C alone, without the knowledge of D. They afterwards transferred a legacy of stock settled upon similar trusts to C and D, by whom it was subsequently sold out, and the proceeds were received by C alone. D left to C the general management of the trust estate, and the choice of investments. Both funds were partially misapplied and lost by C. The plaintiff sought to have both funds made good. It was held that the conduct of D did not justify A and B in considering C as his agent authorised to receive the money.

In another case reported as *Gosling v. Gaskell*,³ by a deed made between a limited company and trustees for debenture holders, the property of the company was transferred to the trustees, upon trust, to permit the company to carry on the business until the happening of one or other of events specified. On the happening of such event the trustees were empowered to appoint a receiver; but it was an express condition of the exercise of that power that "any person so appointed shall be the agent of the company, who alone shall be liable for his acts and defaults". One of the events happened, and the trustees appointed a receiver, who took possession of the mortgaged premises and carried on the business of the company. An order was made for the winding-up of the company and liquidator appointed, who premitted the receiver to carry on the business as before. The respondents sued the trustees for goods supplied to the receiver and after the winding-up order. It was held that the trustees were not principals of the receiver, and were therefore not liable for the price of the goods supplied.

In *Churchward & Blight v. Ford*⁴ copyhold lands were devised to plaintiffs in trust for F for life, but plaintiffs were never admitted to the copyhold. At the time of testator's death the lands were in the possession of defendant to whom F, with plaintiffs' assent afterwards relet them in her own name. Plaintiffs then gave notice to the defendant to pay the rent to them. *Held*: (1) In letting the premises F did not do so as plaintiffs' agent, but as being person interested in the property, and as having general management and control of it in her own hands; (2) No contract could be implied between plaintiffs and defendant, there having been an existing contract between defendant and F, and the occupation having been by permission to F; (3) an action for use and occupation would not lie by plaintiffs against defendant.

1. *Kadwesan v. Ramanathan*, 1927 Mad 478=102 L C 561

2. 12 W. R. 517

3. 66 L. J. Q. B 848; (1897) A. C 575; 77 L. T. 314

4. (1857), 2 H. & N. 446=5 W. R. 831=26 L J Ex 354.

A cestui quē trust is not the agent of the trustee, even in the case of a bare trustee.¹

10. An agent to buy or sell distinguished from vendor or purchaser

In commercial matters, where the real relationship is that of vendor and purchaser, persons are sometimes called agents when, as a matter of fact, their relations are not those of principal and agent at all, but those of vendor and purchaser. If the person called an "agent" is entitled to alter the goods, manipulate them to sell them at any price that he thinks fit after they have been so manipulated, and is still only liable to pay for them at a price fixed beforehand, without any reference to the price at which he sold them, it is impossible to say that the produce of the goods so sold was the money of the consignors, or that the relation of principal and agent exists. When a person has goods consigned to him to sell, and he is bound, if he sells, to pay a fixed price to his employer at a fixed time after sale, but he may sell to his customers at any price and upon any credit he pleases, though he may be called an agent, yet the legal relation of principal and agent does not exist between him and his employer; on the contrary, the relation between him and his employer is that of purchaser and vendor, and a separate relation of vendor and purchaser to whom he sells and the moneys which come to his hands by means of the sales which he effects are his own moneys, and are not impressed with any trust for his employer.² In this case *T. & Co.* consigned goods to *N* at an invoice price. *N* dealt with the goods as owner, and sold them at such prices and in such manner as he thought fit. He sent regular monthly statements of the goods sold, and every month paid the invoice price of the goods comprised in the previous monthly statement. *N* was partner in a firm of *N. J. & Co.*, and by arrangement with his partners used the partnership as his bankers in reference to the above business which he carried on for his special benefit, and an account of the moneys paid in and drawn out was regularly kept. *N. J. & Co.* having executed a deed of arrangement with their creditors, at a time when the account of *N* showed a balance of £2,035 1 s. 2 d. in his favour, the account of *N* with *T & Co.* at that time showed a balance in favour of *T & Co.* of £2,035 11 s. 8 d. *T & Co.* sought to prove against the partnership for the amount of this balance, as being trust money held by *N.* as his trustee. *Held*, that the nature of the business carried on between *T & Co.* and *N* was that of vendor and purchaser, and not principal and agent, and there was no trust. *Held further*, that a consignee who is at liberty, according to the contract between him and his consignor, to sell at any price he likes and to receive payment at any time he likes, but is bound, if he sells his goods, to pay the consignor for them at a fixed price and a fixed time, is not a *del credere*

1. *Stait v. Fenner*, (1912) 2 Ch. 504=81 L. J. Ch. 710=107 L. T. 120.

2. *Ex parte White, In re Nevill* (1871), 6 Ch. 397; see *L. J. James*, at p. 400, and *L. J. Mellish*, at p. 403; and see the same case in the House of Lords, *sub-nom. Toole v White* (1873), 29 L. T. 78

agent, but a principal ; it is immaterial that the parties designate their relationship by the term agency.¹

Ordinarily, it is not difficult to distinguish a case where a person buys or sells for another from that in which he does so for himself, but some doubtful cases do arise because of the mixed motives of the parties or ambiguous framing of the contract. There are certain broad distinctions between the two positions. Thus, if the relation between the parties is that of vendor and purchaser, each party takes upon himself the risk of the fall and rise in price of the article bargained for, and they are at arms' length. The seller binds himself to supply the goods. In the other cases, if the parties are principal and agent, then the agent only undertakes, when he accepts the duty, to use due diligence in trying to fulfil the order, and is paid for his trouble by way of a commission on the work done. He does not take upon himself any part of the risk or the profit which may arise from the fall in prices,² but has to render accounts of his sales, and to account for monies received by him.³

The question involved in all these doubtful cases usually takes one of the two forms, namely :—

- (a) Is the party in question an agent to buy goods for the other or is he buying the goods on his own account and then selling them to that other ?
- (b) Is the party in question an agent to sell goods for the other or is he really buying the goods from that other to sell on his own account ?

A typical case involving the first question is presented where, under an ambiguous contract, one party is accumulating goods to be delivered to another and after the goods have been accumulated in whole or in part but before delivery, they are destroyed by accident. The question then arises who should bear the loss ? What is to be examined in such a case is whether the accumulations were made by such person on his own behalf with a view to re-sell them to the other or whether they were made by him only as an agent for the other. In the former case the loss will fall upon the person who made the accumulations, while in the latter case it will fall upon the person for whom they were made.⁴

The following form very important issues in such cases:—

- (a) Who was to be affected by the fluctuations in price ?
- (b) Upon whose responsibility were the goods to be procured ?
- (c) Who was to determine of whom, where, to what extent and upon what terms the goods to be supplied were to be procured ?⁵

The second question is involved in all those transactions

1. *Towle (John) & Co. v. White* (1873), 29 L. T. 79=21 W. R. 465, affirming 6 Ch. App. 397. C. A. See also *Suryaprakasavaya v. Matheson Coffee Works* 21 I. C. 322 (Mad.)
2. *Ireland v. Livingston* (1871), 5 E. & I. Ap. 395, at pp. 407, 408.
3. See Wright, *Principal & Agent*, pp. 5 & 6.
4. *Mechem*, §§. 43 & 44. See Katiar's '*Law of Agency*', p. 21.
5. *Mechem*, §§. 43 and 44.

which are known as agencies to sell, like auctioneers, brokers, factors, commission merchants and such general dealers who receive goods for sale under what is commonly called a consignment. The most common of cases in which ambiguity occurs are those wherein goods have been delivered to another for sale, but it is not certain whether he is to sell them as agent of the person from whom he received them or whether he has purchased them from that person and is to sell them on his own account. This uncertainty is to be attributed sometimes to the ignorance or inattention of the parties in making their contracts, sometimes to the desire of the parties to evade the operation of a particular statute like a recording act or to save the imposition of a particular tax as a municipal octroi duty, but more frequently to the conscious desire of one of the parties, at least usually the one from whom the goods are received to have the transaction afterwards to take the form either of agency or sale as shall best suit his purposes.¹

In all these cases the true nature and effect of the transaction is to be looked into without caring much for the names which the parties choose to give to each other or to their contracts. The essence of sale is the transfer of the title to the goods for price paid or to be paid. The transferee in such case becomes liable to the transferor of the goods as a debtor for the price to be paid and not as an agent for the proceeds of the re-sale. Fluctuations in price and loss or gain to the goods in such case which result after the receipt or the goods go to the transferee and not to the transferor who must remain contented only with such sums as were agreed by the parties to be paid in lieu of the goods transferred. The essence of agency to sell is the delivery of the goods to a person who is to sell them not as his own property but as the property of the principal who continues to be the owner of the goods and therefore entitled to control their sale, as for instance, to fix their price, to dictate the terms of re-sale or to re-sell the goods. He cannot demand the price of the goods before re-sale but only such proceeds as accrue to him on such a resale.²

In every doubtful case the following issues generally determine the question :—

- (1) Who was to be affected by the fluctuations in price ?
- (2) Whether the price to be paid was any sum already agreed between the parties or only the proceeds of the re-sale subject of course to such deductions as to such commission and expenses as might have been agreed between the parties ?
- (3) Who was to bear the accidental loss to the goods in the time that intervened the receipt of the goods and their re-sale ?³

The courts in endeavouring to interpret an ambiguous contract generally incline to interpret it against the party whose mixed motives or ambiguous language has caused the uncertainty,

1. Mechem, §. 46

2. Mechem, § 48.

3 See Katwar, p. 23.

especially when such a course is demanded for the protection of innocent persons against whom the contract is sought to be enforced.¹

It has been observed that the form of contract while not at all conclusive may be of much assistance in determining the question, and the weight of this evidence is increased by the extent to which the contract appears to disclose the real intention of the parties rather than to be an artful and wordy cover of the real purpose.²

In *Thompson v. Meade*³ a stockbroker was given a limit at which to buy shares. He bought the shares below the limit, and charged the customer as if he had bought them at limit price. The court held that he had acted as seller and not as agent, and that the customer was therefore not liable for the loss on re-sale as the stockbroker had not done what he agreed to do.

A purchaser alleged, by his answer to a suit for specific performance, that he acted as a puffer in bidding for one lot, and also as a puffer in bidding for another lot, which was knocked down to him, and that he therefore purchased the lot, and signed the agreement for the purpose, as the agent of the vendor; but the statement in his depositions of the circumstances attending the signature was somewhat different from that in his answer and he had signed an order on his attorney for payment of the deposit money. It was held that there was not sufficient evidence of agency, and the defendant was held to have purchased on his own account.⁴

A, a foreign merchant, employed B, to purchase goods on commission; the vendors (with the knowledge that the purchases were made on account of A) made out the invoices to B, and took in payment his acceptances payable at six months. It was held that there was no contract of sale as between A and B.⁵

Plaintiff, a commission merchant acting on a telegram from defendants, distillers, bought a cargo of corn, which he shipped on a schooner, and drew on defendants for the amount. Plaintiff insured the cargo in his own name. He then transferred the draft to a bank and procured its discount, indorsing the bill of lading to the bank and handing them the insurance policy, these documents to be regarded as collateral security. The bank was instructed not to deliver the bill of lading until after payment of the draft. On arrival it was found that the corn was damaged, and defendants refused delivery and declined to pay the draft. Plaintiff retired the draft, and the corn was sold for the best price obtainable, and plaintiff sued for the balance. It was held that the contract was one of sale and purchase and not of agency.⁶

1. *Arbuckle v. Kirkpatrick*, 98 Tenn 221.

2. *Mechem*, §. 46.

3. (1891), 7 Times, 698.

See also Mr. Justice Blackburn's opinion in *Ireland v. Livingston* (1872), L. R. 5 H. of L., 395, at pp. 407, 408

4. *Bennett v. Smith*, 16 Jar 421.

5. *Seymour v. Psychlan*, 1 B & Ald. 14.

6. *Corby v. Williams* (1881), 7 S. C. R. 470 (Canada)

D, traveller of plaintiffs, a carriage manufacturing company, having been approached by the manager of W. Co. with a view to the purchase of carriages, and having declined the offer on the ground that W. Co.'s credit was not sufficiently good, was taken by the latter's manager to defendants, who then signed a guarantee addressed to plaintiffs in the following terms: "We hereby oblige ourselves to the amount of \$ 1000 for purchase they (W. Co.) may now make from you at any time." Plaintiffs then supplied, W. Co. with carriages to the value of \$ 1,824. subject to the condition that the title to the goods should not pass till they had been paid for. The amount being unpaid plaintiffs sued defendants on the guarantee." *Held*, the contention that the transaction was not a sale to W. Co. but an authority to them to sell as agents of plaintiffs, could not stand, because W. Co. were to sell for themselves and the purchase money was to be theirs.¹

Plaintiffs, carriage manufacturers and sellers desired S, a manufacturers' agent, to handle their goods and arranged with him to "cut out" a rival firm for which S acted as agent, and deal with plaintiffs. S gave a signed order for some buggies, which provided that they were to be paid for by draft and that the property was to remain in plaintiffs until actually paid for. S sold two of the buggies to defendants, who gave a draft and two other buggies in payment, and shortly after the sale, plaintiffs drew on S for the amount of the invoice. The draft was accepted, but not paid at maturity by S. S had not handed over defendants' note to plaintiffs. Plaintiffs made a demand on S for payment, who said he had no money, and that the buggies were in possession of defendants. On the day that the plaintiffs made their demand on S, they appointed him their agent to sell and agreed that the terms should apply to all goods sold and unsettled for, but this arrangement did not include the buggies sold to defendants which had been settled for. *Held*, that the transaction between plaintiff and S was one of sale and not of agency.²

A co-operative dairy company received butter-fat from suppliers to be manufactured into butter and cheese. The butterfat went into bulk, and the identity of each supplier's property was lost. The suppliers were consulted each year as to the mode of disposal of the butter and cheese, and as the company had deducted the cost of manufacture according to a fixed scale the proceeds were divided proportionately among the suppliers. *Held*, that the relation between the suppliers and the company was that of principal and agent and not that of vendor and purchasers, and the property in the butter remained in the suppliers.³

A agreed with a company that he should be its 'sole agent' for the sale of certain machines. The agreement provided that A should sell twenty-five machines yearly and that, upon the determination of the agency, he might collect on his own

1. *E. N. Henry Co. v Birmingham* (1908) 6 E. L. R. 385, (1909) E. L. R. 163 (Canada).

2. *Dominion Carriage Co., v. Wilson* (1910), 17 O. W. R. 363 (Canada)

3. *Bruce v Good, Good v. Bruce* (1917) N. Z. L. R. 515 (New Zealand)

account all moneys due in respect of machines which he had sold. It was also provided that the price at which the machines should be invoiced to A should be £ 37 10s. net duty paid, c. i. f. Wellington, and should be paid for in cash against documents. *Held*: the relation was that of vendor and purchaser and not that of principal and agent, and the company was liable for failure to supply machines during the currency of the agreement.¹

C consigned goods to a company on terms they should remain the property of C, the company undertaking their storage and not to sell below certain prices and to account each year for the goods sold. *Held*, that the company was not a purchaser of the goods from C, but merely an agent to sell on his behalf.²

In an action for price of goods supplied, the facts were that from the commencement of the dealings plaintiff had sent to defendant every week an invoice for goods "sold" showing the price, and had kept an accurate account of the sales. Plaintiff made no request for an account, but would not have continued sending goods without receiving an account had he regarded defendants an agent. Defendant had kept no account of the transactions for the purpose of his commission. Defendant had submitted a draft agency agreement to plaintiff, but plaintiff did not agree to its terms and had refused to sign it. *Held*, the course of the dealings showed the relations of vendor and purchaser, and not that of principal and agent.³

The bkpts. carried on business as East India agents, and sold goods upon commission. Upon the invitation of bkpts. applts., wholesale silversmiths, sent certain goods to bkpts. office as samples and the goods were to remain at applts. risk. The usual practice of bkpts. was to introduce their customer to applts., who supplied him with goods corresponding to the samples but in cases of urgency bkpts. sold the samples themselves. *Held*, that the parties were not in fact vendors and purchasers, but principals and agents.⁴

The fact that the principal agrees to pay his agent for sale a commission varying according to the amount of profit obtained by the sale, or depending upon the surplus which the agent can obtain over and above the price which will satisfy his principal, does not alter the nature of their relation and turn the agent into a purchaser. The fact that by the contract the agent guarantees all accounts shows that he is not the real purchaser, but a *del credere agent*.⁵

Manufacturers supplied goods to a retail firm under agreements in which the latter were described as "stockists" "consignees" and "stockists or agents". The property in the goods was to remain in the manufacturers till actually sold and paid

1. *Fraser Ramsay (New Zealand) Ltd. v. De Renzy* (1913), 32 N. Z. L. R. 553 (C. A. (New Zealand)).
2. *Re ward, Farmers' Association, Ltd.*, (1897) 15 N. Z. L. R. 480.
3. *Gallagher v. Freedman* (1913), 23 W. L. R. 389=10 D. L. R. 436 (Canada).
4. *Re Watson & Co. ; Ex p. Atkin Brothers* (1904) 2 K. B. 753=73 L. J. K. B. 854=91 L.T. 709.
5. *Re. Smith, Ex p. Bright* (1879), 110 Ch. D. 566.

For. The goods were to be supplied at wholesale prices, and the retailers were to sell at prices fixed by the manufacturers and to get the difference between the wholesale and retail prices. The retailers sold the goods to their own customers and debited them with the retail price in their own books, and rendered accounts to them in their own name. The customers' name were not disclosed to the manufacturers, and the retailers used the money received for the goods for their own purposes. The manufacturers rendered accounts to the retailers showing the amounts due in respect of goods supplied which were settled by the retailers. The amounts received by the retailers were never appropriated in a separate account to the manufacturers. The accounts rendered to their customers by the retailers contained items other than the manufacturers' goods. *Held*, the relation was that of sellers and buyer, not that of principal and *del credere* agent.¹

B and G agreed that B, Transvaal agent for certain beer syphons, should order one hundred syphons from Germany, G to pay B £ 300 for such syphons and no more, and to allow B to purchase them from him on arrival for £ 425, and B to order the syphons in his own name and pay all charges. On arrival B was in any event to have the use of the syphons, and no delivery to G was contemplated. In the event of B purchasing, it was agreed that the ownership in the syphons should remain in G till the whole of the £ 425 had been paid by B. It was held that under this agreement B was not G's agent to import but the purchaser of the syphons from the manufacturer, the arrangement between B and G being merely an attempt to effect a pledge, in the guise of a sale, in favour of G in security of an advance of £ 300.

Plaintiffs shipped machines to defendant, accompanied by invoices which contained an item "to balance of account rendered" followed by charges for new merchandise sold and giving credit for amounts received. They supplied defendant with a book of their notes which stipulated that the goods should remain the property of plaintiffs until paid for by purchasers, but no instructions were given as to selling price nor did plaintiffs receive information regarding sales made by defendant. The lien notes were filled in by customers; and defendant after indorsing them, sent them to plaintiffs for his credit. He also gave them a promissory note for balance due from him on his account and had at times made payments in cash. Defendant had never made a charge for commission. It was held that the transactions represented genuine sales intended and expected to be paid for by defendant.²

Plaintiff ordered a tractor from defendants, sellers of agricultural machinery, who were appointed agents by the manufacturers and supplied by them with tractors at English prices. Defendants and not their customers were responsible for the purchase price, defendants, however, agreeing not to charge their

¹ *Mitchell Tyre Co Ltd. v. Macfarlane (Glasgow) Ltd.* (1916) 28 L. T. 221 (Scotland).

² *Berk's Trustee* (1906), Transvaal Supreme court, 167—S. A. F.

³ *Richardson v. Eldridge*, (1908), 34 Que. S. C. 424 (Canada)

customers more than a certain price. It was held that the relations between the manufacturers and defendants were those of purchaser and seller and not of principal and agent.¹

Plaintiff entered into a written agreement with B to supply him with logs. B transferred his rights to defendants, who entered into an agreement with plaintiff to pay him the balance that might be due to him by B. Plaintiff and B afterwards made a settlement without the knowledge of defendants, on which a balance was struck in favour of plaintiff. *Held*, B was not the agent of defendants for the purpose of this settlement.²

Where a consignee of goods for sale is authorised to sell them at a certain minimum price and told that whatever amount he obtains above that price will be his commission, the relationship between consignor and consignee is that of principal and agent.³

Defendants gave to plaintiff a written order to ship goods from England on account of defendants and plaintiff ordered goods from a manufacturer in England to be shipped in performance of this order. It was held that the relationship between the parties was that of principal and agent, not of vendor and purchaser.⁴

11. Agency distinguished from partnership.

Under section 4 of the Indian Partnership Act, 1932, "partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them *acting for all*. One of the tests of partnership is whether there is a binding contract of *mutual agency* between the partners.⁵ The important fact in determining whether a partnership exists is to see whether the relation of principal and agent exists between the parties and not merely whether the parties share in the profits and the business is carried on for the benefit of all. Persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents.⁶ Thus in *Bullen V. Sharp*⁷ an assignment of the profits of a business upon trust to another to take a certain amount out of the profits and pay the residue to the assignor with a power to the assignee to act for the assignor in the business did not make the assignee a partner because it was the assignor's business and he had no authority to bind the assignee. Similarly, no relationship of partnership arose where a debtor assigned his property to trustees for the benefit of his creditors and carried on his trade under their control, because there was no relationship of principal and agent between them

1. *Seggie v. Philip Bros.*, S.A.L.R. (1915), C.P.D. 292 (Australia).

2. *Sutherland v. Gilmour* (1846), 3 Kerr, 165 (Canada).

3. *Re Grocery v. Higgs & Keen*, (1925) 3 D.L.R. 565=(1925) 2 W.W.R. 402 (Canada).

4. *Bulleis v. Roope* (1922) N.Z.L.R. 549 (N.Z.).

5. *Janki Nath v. Dhokar Mall*, 1935 Pat. 376=156 L.C. 200.

6. *Cox v. Hickman*, 8 H.L.C. 268, *Badeley v. Consolidated Bank*, 1888, L.R. 38 Ch. D. 258; *Chimmanram v. Jayanti Lal*, 1939 Bom. 410=41 Bom. L.R. 899.

7. L.R.I.C.P. 86.

and the debtor was the master and the trustees were only inspectors and controllers.¹

The Act specifically prescribes that subject to the provisions of this Act (The Indian Partnership Act), a partner is the agent of the firm for the purposes of the business of the firm.² As between the partners and the outside world (whatever may be their private arrangement between themselves), each partner is the *unlimited agent* of every other in every matter connected with the partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership.³ Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made, but with such private arrangements third persons dealing with the firm without notice have no concern.⁴

The next section of the Partnership Act deals with the implied authority of the partner as agent of the firm. It states that an act of a partner which is done to carry on business of the kind carried on by the firm, and is done in the *usual way* in such a business binds the firm. Every partner is in contemplation of law the general and accredited agent of the partnership, or as it is sometimes expressed, each partner is *proepositus negotiis societatis*, and may consequently bind all the other partners by his acts in all matters which are within the scope and objects of the partnership.⁵ Sections 20 to 27 of the Act further govern this relationship.

Although a partner managing the partnership business or partnership property is regarded by law as an agent of the firm for the purposes of the business of the firm inasmuch as all contracts entered into by him bind the other partners and he is bound to account for every act of his to them like an agent,⁶ yet the position of an agent and that of such partner are not identical inasmuch as every agent is not a partner with his principal even if he is remunerated by a share in the profits of the business.⁷ As stated above, existence of agency is no doubt one of the modern tests of partnership inasmuch as all partnerships result in a certain type of agency, but it is not the sole test. Where, therefore, there has been no holding out of the agent as partner the matter must be determined by the agreement of the parties themselves.⁸ While parties may create partnership without actually intending that specific

1. *Hedguth v. Wigg* L.R. 1 Ex. 335; *Easterbrook v. Barker* L.R. 6 C.P. 1

2. S. 18, Indian Partnership Act, 1932. See also *M. Abdul Latif v. Gopencar*, 56 Cal. L.J. 172

3. Per Lord Westbury in *Ex Parte Darlington etc., Bankers Co.*, In re *Riches*, (1864) 4 De G. J. & S. 587-588.

4. Lord Cranworth, *Cor v. Hickman*, (1860) 10 East 264

5. Story on Agency, 124, adopted in *Bank of Australasia v. Breidlat*, (1847) 6 Moo. P.C. at p. 183. See *Ram v. Kasem*, 28 C.W.N. 824

6. S. 9, Indian Partnership Act, 1932.

7. *Sodakar v. Applegate*, 24 W. Va. 411, *Zuber v. Roberts*, 147 Ala. 512; *Bizard v. Bank of Greenville*, 67 Tex. 88.

8. See *Griston v. Strong*, 147 Ill. 587, *National Lumber Co. v. Gray's Harbour Co.*, 127 Pac. 577

result where they voluntarily enter into an arrangement whose necessary legal effect is the creation of partnership, Courts are reluctant to surprise parties into that relation when they clearly did not intend it.¹ "Every doubtful case", observes Carley, "must be solved in favour of their intent; otherwise we should carry the doctrine of constructive partnership so far as to render it a trap to the unwary."²

A fire insurance society being an unincorporated association under its powers entered into treaties with other companies, appointing them its agents in foreign lands, and agreeing to accept and enter upon the risk of one-eighth of every fire insurance policy of such companies in force at the date of the treaty or effected or renewed after that date, and agreed to be on all risks simultaneously with the other companies, the other companies agreeing to pay a proportion of the premiums, 20 per cent. commission to be allowed on such premiums to the agents for the expenses of conducting the agency. The fire assurance society having gone into liquidation, the chief clerk allowed the claim of another company for sums due to it in respect of guarantee and treaty business. On a summons by the liquidator to vary the certificate, it was held that the treaty agreements did not constitute an amalgamation between the contracting companies, nor a partnership either *inter se* or as regarded third persons, but were agreements of agency.³

Plaintiff sold half his interest in certain land to defendant, and they agreed to build their houses thereon at their joint cost, raising the necessary money by mortgage and contributing the remainder in equal shares. Defendant collected the rents on their joint account, and out of them paid mortgage interest and outgoings, rendering accounts to plaintiff. In an action by plaintiff alleging that defendant had not contributed his just share, and had not properly accounted for rents, *held*, that the accounts could not be gone into beyond six years from date of writ,⁴ as the dealings did not constitute a partnership, the parties being co-owners only, and in collecting the rents, paying outgoings, and rendering accounts, defendant had acted as an ordinary agent and not as an express trustee.⁵

An agreement by several persons stipulated that one of them should furnish the premises in which to carry on the business and capital for carrying on the business, and he should receive a stipulated sum annually for his time and expenses, and the others stipulated sums together with a proportion of the net profits. It was held that contract created a special agency, not a partnership, between the parties.⁶

Plaintiffs agreed with B that he should purchase and ship to plaintiffs such lumber as they should direct—in consideration whereof plaintiffs were to furnish B with the necessary funds

1 Mechem, § 51

2 Per Carley J in *Beecher v. Bush*, 45 Mich. 188

3 *Re Norwich & Equitable Fire Assurance Society*, Royal Insurance Co's Claim (1887) 57 L. T. 241=3 T. L. R. 781; 1 Digest, 269

4 See the Indian Limitation Act, 1908, for limitation in such cases in India

5 *Russ v. Robertson* (1904), 24 C. L. T. 228 (Canada), 1 Digest, 269

6 *Munson v. Hall*, (1863) 10 Gr. 61 (Canada); 1 Digest, 269

for purchasing, shipping and other expenses connected therewith, and out of the profits when the lumber was sold to allow and pay to B a percentage for his services, and to apply the remainder of the profits in payment of B's prior indebtedness to plaintiffs. An execution creditor of B seized the lumber purchased by him. *Held*, (1) there not being a community of profit and loss between plaintiffs and B there could be no partnership; (2) B was the mere agent of plaintiffs.¹

12. Agent distinguished from arbitrator.

Briefly speaking, arbitration is the settlement of a dispute between two parties by a tribunal of their own choosing or a compromise of the dispute not by the parties themselves but by persons authorised by them in that behalf. It is therefore a matter of great importance to the parties to choose such persons who are impartial and in whom confidence can be reposed. In *Calcraft v. Roebuck*² Lord Thurlow observed: "It is not uncommon for a person, appointed arbitrator, to consider himself as agent for the person appointing him. How that is so common I wonder; as it is against good faith."

An agent must therefore be distinguished from an arbitrator. In *Great Northern Railway Company v. Harrison*,³ an indenture between H and a Railway Company, after reciting that the Company was desirous of being supplied with 350,000 railway sleepers, and that H was willing to supply them according to the terms of a specification and tender, contained a covenant by H that he would supply the sleepers within the time specified "as and when, and in such quantities, and in such manner," as the engineer of the company, by order in writing, "from time to time, or at any time within the period limited by the specification, should require." The specification stated that the number of sleepers required was 350,000; and that one half would have to be delivered in 1847, and the remainder by midsummer, 1848. The deed also contained provisions that the engineer might vary the times of delivery; that the company should retain £ 2,000 in its hands as security for the performance of the contract, and should pay it over within two months after all the sleepers had been delivered, and that the contract might be put an end to in certain events. *Held*: the engineer, as to matters in which he had a discretion, e. g. as to varying the time of delivery of the sleepers, stood in the position of arbitration between the parties; as to giving the order for the delivery he was a mere agent of the company.

13. Agency distinguished from other Possessory Rights

An agent must also be distinguished from a person coming into possession of or controlling the property of another person such as a lessee, a licensee or bailee. The mere fact that certain management and control of property is transferred by a contract from the owner to another person does not make that contract as the contract of agency. Thus, a lessee who

1. *Clark v. Mc Kellar* (1862), 12 C. P. 562 (Canada), 1 Digest, 269.

2. (1790), 1 Ves. 221=30 E. R. 311; 1 Digest, 268.

3. (1852), 12 C. B. 576; 1 Digest, 268.

is allowed a certain amount of the rent with which he is to make certain agreed repairs or improvements and supply furnishings is not the agent of the lessor.¹ But although a contract may be called a lease, if the so-called tenant is so far under the direction and control of his alleged landlord as to make the latter a real party in interest and the former merely his representative, the contract will be held to be one of agency.² The same is the case when a so-called licensee acts only for the benefit of the grantor and to accomplish his ends and purposes.³ But where one who has the power to give or without permission, grants to another, gratuitously or for a consideration, the right for the grantee's benefit, to use the grantor's property, operate under his patent, publish under the copyright, sell under his trade mark, and the like, *per se*, does not make his grantee an agent so as to bind the grantor by contracts respecting the property involved, or otherwise or to make the grantor responsible for the acts or omissions of the licensee,⁴ The same remarks apply to a person holding the property as bailee.⁵ Mere possession gives no authority to sell or otherwise dispose of property inconsistent with the provisions of the Indian Contract Act or any other Act applicable to the case. Possession, however, may be delivered to such a person or under such circumstances or accompanied by such indicia of authority or ownership as to estop the true owner if the bailee has thereby been enabled to deceive an innocent taker for value. In such a case the owner may be saddled with liability as principal for the acts of his bailee.⁶

The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor" and the bailee is called the "pawnee".⁷ Sections 173 to 181 of the Indian Contract Act regulate the retention or disposal of goods by the pawnee coming into his possession as such. It has been held that where a power of sale over another's goods is exercisable irrespective of any failure to pay sums due by that other to the holder or the power, the latter is an agent for sale and not a pledgee.⁸ It has also been held that a person who takes a furnished house is not an agent intrusted with the furniture but a bailee.⁹

14. Agent advancing money in the business of agency distinguished from a mere creditor.

Ordinarily there is no difficulty in distinguishing the relation of principal and agent from that of the lender and the

1. *Pray Appledore*, 76 N.H. 167, *Ratham v Bellingworth*, 71 Ala 35, see Katlar, p. 27.
2. *Pettecay v McIntyre*, 111 N. Car. 433; *Reysdale Meridian Land Co* 71 Miss 284 See Katlar, p. 27
3. *Bingham v Hickman*, 115 pa 420 *Ct Cor v Hickman*, 8 H.L. Cas 268
4. See *American Press Association v Daily Story Pub Co* 120 Fed 766, *Thomson v Batcheller*, 201 N.Y 551; Katlar, p. 27.
5. *Shepherd v. Union Bank of London* 5 L. T. 757
6. *Mechem*, § 54.
7. S. 172, Indian Contract Act 1872
8. *Mitchell v Sykes*, (1893), 40 B 501 (Can.), 1, Digest 269
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borrower, but cases may arise in which one who claims to have been merely a lender may be really a principal or a partner as evidenced by the stipulations arising out of the contract regarding sharing of profits in lieu of interest or the like. The tendency of the courts in modern times is to endeavour to give effect to the real intention of the parties, and where there has been no holding out as principal or as partner, not to charge one as principal or partner who did not intend to become such, unless that is the necessary legal effect of the arrangement into which the parties have entered.¹

Where money was advanced to another for purchase, under a contract providing that it should be used for no other purpose, that title in the corn should be deemed to be in the one who advanced the money, that the latter should sell it and receive the money and retain the amount advanced and interest at 10 per cent. and expenses and commission of one per cent. a bushel, it was held that the contract was a contract of agency even though the person to whom money was advanced was to guarantee the other against all loss and to make good the investment with interest, compensation and expenses.²

In India such agencies are very common, specially in connection with grain business. Such an agency takes deposit from the grain dealers covering a certain per cent of the money to be invested, the remainder is supplied by the agent charging interest at a certain per cent. rate. The grain is purchased and stored by the agent in his own name and he keeps it in his possession and control as security for the money invested and sells it in his own name, subject, of course, to the direction of the principal as to the opportune time of sale, realises the sale proceeds and retains the money invested, interest and expenses and a commission at a certain per cent. on the purchase money, and makes over the balance to his principal. In fact the position of such a person is both of a creditor as well as of an agent. He is creditor so far as he advances money and charges interest and is secured by the pledge of the commodity which he retains as security. He is agent so far as he makes purchase, effects sale, realises money and does other acts of management and control.

It has been held that the best test whether a person is an agent or only an ordinary debtor is to inquire whether it is his duty to keep money deposited with him so ear-marked that in the event of his death, it could be said this is the depositor's money, or was the alleged agent warranted by all the previous transactions between the depositor and himself in securing the money and treating himself merely as a debtor to the depositor to that amount.³

15. An agent distinguished from a mere messenger or a person used merely as a mechanical aid or instrument.

'If I have negotiated the terms of a contract which shall be operative or not according to the message which I am to

1. *Mechem v. Valentine*, 145 U. S. 611; *Hurrey v. Childs*, 28 Ohio St. 319; See *Katiar*, p. 28.

2. *Dowds v. Morse*, 62 Iowa 231; *Van Sandt v. Dowds*, 63 Iowa 594; *Katiar* p. 28.

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3. *Re Nantes* (1861), 1W & W 11 (Aus.) 1 Digest, 268.

send to the other party, the person whom I employ to deliver the message may be the instrument or agency through which I make the contract for me. He is no more an agent in the true sense than is the mail or telegraph which is the instrumentality through which a contract may be negotiated.¹

A messenger, in the words of Mr. Hunter,² is like a letter, simply a medium of communication; he exercises no judgment of his own, but merely repeats what is told to him. An agent, on the other hand, acts on his own judgment, subject of course, to the limits of his instructions. These instructions may be minute and precise, leaving little to the exercise of the agent's judgment, but unless they do away with the necessity of his exercising his judgment altogether, the agent is distinguishable from a mere messenger.³

Similarly, where a person about to perform certain act, himself determines upon all of the elements of it, which essentially belong to it, he may avail himself of any mechanical or ministerial agency which may be convenient in giving physical form or manifestation to the Act. Human instrumentalities may be employed for this purpose as well as inanimate ones. If he wishes to sign his name to a document he may use a pen, a typewriter, a rubber stamp or the hand of a third person indifferently. Inasmuch as in such a case, he furnishes the consciousness, volition, the will and causes the act to be done under his immediate direction and control, and it is his act whether he employs an inanimate tool to make the visible mark or an animate one. Such a tool so used is not an agent and rules governing the appointment of agents do not apply to its use. It may, therefore, be stated as a rule of wide application, that acts of a merely mechanical or ministerial nature, done by one person in the presence and by the direction or assent of another and as a part of some larger act which the latter is then engaged in performing are as valid as if done by the latter in person.⁴ The person so acting ministerially or mechanically is a mere tool or instrument and not an agent.

16. Nomenclature of parties not conclusive evidence of relationship—actual facts must be looked into

The parties to the relation of agency although generally designated as principal and agent, may be and are often designated by other names as well. For instance, an agent is often called an *attorney* or an *attorney in fact* and occasionally a proxy, a delegate or a representative; so a principal is often designated an employer, a constituent or a chief.⁵ Names which the parties may choose are by no means conclusive evidence of the real relationship that exists between them. They are not always a proper guide in the matter but may often mislead one if proper care is not taken to sift the other evidence relating to it. In order to decide this question one must always

1. Mechem, §. 62.

2. Roman Law.

3. See also *Johnson v. Gummondson* 19 Mar. & Law Rep. 83; *Katlar*, p. 29.

4. Mechem, §§. 63-208 and authorities cited therein; See *Katlar*, p. 30.

5. See Mechem, para. 26; *Story on Agency*, §. 3.

Look to the conduct of the parties and the purport of their dealings rather than to the form which is often deceptive¹ The use of the word "agent" is not decisive of the character of agency of a party, but in order to determine whether a party stands in the relation of an agent or principal in reference to the other contracting party the nature of the agreement and the course of business between the parties have to be taken into account.² The word 'agent' in itself means very little; the facts must speak for themselves, and if those facts show a state of things different to a simple arrangement between a principal and agent, the effect of those facts will not be altered simply because the language of agency has been used in a loose manner.³

Modern business has given extension to the terms 'agent' and 'agency'. In many trades—particularly, for instance, in motor car trade—the so-called agent is merely a favoured and favouring buyer.⁴ In this trade the persons described as "agent" are not agents in respect of any principal, but are purchasers who buy from manufacturers and sell independently of them.⁵

It has been observed by Lord Herschell in *Kennedy v. De Trafford*⁶ that no word is more commonly and constantly abused than the word "agent." A person may be spoken of as an agent and no doubt in the popular sense of the word may properly be said to be an agent, although when it is attempted to suggest that he is an agent under such circumstances as create the legal obligations attaching to agency that use of the word is only misleading. A person may use expressions calling himself an agent, but however true or applicable they may have been in a popular sense, if in point of law and in their legal sense they are meaningless, they may be treated as such.

Similarly, an agent employed by an insurance company to introduce business to the insurers is not in any real sense of the word their agent.⁷ The question of agency is a mixed question of fact and law very largely depending on the evidence in the particular case.⁸

17. Held to be agents.

A person who is paid commission by another for sale of goods,⁹ or who is entrusted with goods to be disposed of for money,¹⁰ is an agent. Similarly, where a person orders for some goods through another to be purchased for him on his account

1. See *Suryaprakasaya V. Motheson's Coffee Works*, 21 I. C. 322=14 M. L. T. 249, *Ex parte White*, 24 L. T. 45; *Fowle V. White*, 29 L. T. 78.

2. *Re Nevill*, L. R. 6 Ch. 397; *Re Smith* 10 Ch. D. 566; *Re Cotton*, 108 L. T. 310.

3. *Ex parte White*, 6 Ch. A. 307, S. C. on aff. *John Towle & Co. v. White*, 27 L. T. 78; *Suryaprakasa V. Coffee Works*, 21 I. C. 322.

4. *Hope Prudhomme & Co. v. Hamel and Horley & Co.*, 49 Mad. 1=1925 P. C. 161=88 I. C. 307=30 C. W. N. 794.

5. *Lamb V. Goring Brick Co.* (1932) 1 K. B. 710; see also *Motor Union Insurance Co. V. Mannheimer* (1933) 1 K. B. 82.

6. (1897) A. C. 180=76 L. T. 427=66 L. J. Ch. 413.

7. *Kwa Hai V. Northern Ass. Co.*, L. L. R. 2 Rang. 158=1924 Rang. 269=83 I. C. 569.

8. *Adaikappa V. Vatesan*, 1931 mad. 381=1930 M. W. N. 729.

9. *Nensukhdan v. Birchand*, 19 Bom. L. R. 948.

10. *Singer Sewing Machine Co. v. Yen Kun* 1933 Rang. 68=81 I. C. 163.

and risk, a contract of agency and not of sale is created.¹ A person who under a contract purchases goods for another, holds them for him and sells them upon his instructions,² or who is employed by another to invest money on his behalf and to represent him in dealings with the debtors,³ is an agent.

In the absence of a contract to the contrary, the ordinary rule is that where goods are delivered to a carrier for transmission to the buyer, the carrier is presumed to be the buyer's agent not only to take delivery but to assent to the appropriation of goods.⁴ In *Chartered Bank v. B. I. S. N. Co.*⁵ it has been held that landing agents at Penang are in the position of intermediaries owing duties to both parties; agents for the shipowners so long as the contract of hypothecation remains unexhausted; agents for the consignees as soon as the bill of lading is produced with delivery order endorsed. But if conflicting claims are made to any part of the cargo, they are agents for making delivery on behalf of the shipowners.⁶

Every partner is an agent of the firm and of the other partners for the purposes of the business of the partnership.⁷

It has, however, been held that a partner who does an act for the firm is an agent of the firm but not for his partners and the law applicable is the law of partnership and not that of agency.⁸

Joint Hindu family

The word "person" in section 182 of the Contract Act includes a Joint Hindu family and so an agent can be employed on behalf of such family⁹, and contracts can be entered into and enforced on its behalf. So, where under an agreement two of the five brothers agreed to manage the joint property for a certain sum the relationship of principal and agent was created.¹⁰ But the manager of a Joint Hindu family is not the agent of the family in the strict sense of the term¹¹, and so is not liable to render accounts to the latter as principals¹², or to make the members of the family liable to be sued as if they were the principals of the manager. The relation of such persons is much more like that of a trustee and *cestui que trust*¹³. He has, however, an implied authority to contract debts for the ordinary purposes of the business carried on by the family¹⁴.

Co-sharer

The relation between one co-sharer and another who

1. *Mahomedally v. Schiller* 1 L. R. 13 Bom. 470.

2. *The firm of Devi Sahai v. Tirath*, 1923 Lah 473.=78 I. C. 143.

3. *Khuh Chand v. Chittar Mal*, 1931 All. 372. See also *Murugappa v. Off. Ass. Madras*, 42 C. W. N. 8, P. C.

4. *Muga Mal v. Sunday Patrick & Co.*, 12 I. C. 862

5. 13 C. W. N. 733 P. C.

6. *Bombay Co., v. Karachi Port Trust* 42 I. C. 659.

7. *Munshi Abdul Latif v. Gopeshwar*, 56 Cal. L. J. 172

8. *Benari v. Raja Ram*, 163 P.L.R. 1911=10 I.C. 250=214 P.W.R. 1911.

9. *Shankar Lal v. Tishan Pal*, 1934 All. 553=150 I.C. 151. See also *Murugappa v. off. Ass. Madras*, 42 C.W.N. 8, P.C.

10. *Gorinda Chetty v. Dorasamy Chetty*, 29 I.C. 505.

11. *Kanda Sami v. Somnashanta*, 20 M.L.J. 371

12. *Biraj v. Abani*, 42 C.W.N. 1157

13. *Annamalal v. Murugappa*, 7 C.W.N. 754 P.C.

14. *Maluk v. Daya*, 106 I.C. 183; *Parthi v. Mamchand*, 156 I.C. 539

manages any property or business on behalf of the other who is his co-sharer is one of agency.¹

A solicitor employed for sale of property receiving the deposit money holds it as agent for the vendor. His position in no degree resembles that of an auctioneer.² The pleader is the agent of the client, a disclosed principal.³

Solicitor
and Pleader

In the case of a counsel his authority at the trial, unless limited, relates to the trial and all matters incidental to it and to the conduct of the trial.⁴

A receiver appointed by the court is not the agent of the court or of anybody else but is a principal.⁵ and is personally liable to persons dealing with him unless the express terms of the contract exclude his personal liability.⁶ But a receiver appointed by a mortgagee under the ordinary power for that purpose is in possession as agent not of the mortgagee but of the mortgagor.⁷ A receiver appointed by the debenture holders is their agent and has authority to pledge the assets in priority to the debentures.⁸ A receiver under the Provincial Insolvency Act is exactly in the same position as the trustee in bankruptcy and the whole of the property of the insolvent is vested in him, and he is the owner of the property, until he is discharged. He is an officer of the Court and does not represent either the debtor or the creditor.⁹

Receiver

Stevedores are not servants of the shipowner; they are persons having a special employment, with entire control over the men employed in the work of loading and unloading. They are altogether independent of the master or owner. In one sense they may be said to be agents of the owner; but they are not in any sense his servants. They were not put in his place to do an act, which he intended to do for himself.¹⁰ In *Blaikie v. Stenbridge*,¹¹ a ship was chartered by the owner to A for a voyage with cargo to a port and back for a stipulated rate of freight per ton on the homeward cargo, the cargo to be taken to and tendered alongside at the charterer's risk and expense, the ship to be consigned to the charterer's agent at ports of loading and discharge and a stevedore for the outward cargo to be paid by and to act under the captain's orders. The charterer put up the ship as a general ship for the port and appointed a stevedore, who with his men sent on board for the purpose of stowing the vessel, in the usual course of his business. The master gave no orders to or in any way interfered with the

Stevedores

1. *Chandra Madhob v. Nabin*, 40 Cal. 108=17 Cal. L.J. 103=18 1. C. 735.
2. *Edgell v. Day*, L.R.I.C.P. 80.
3. *Bidhu v. Ahmad*, 42 C.W.N. 1263.
4. *B. N. Sen v. Churni Lal Dutt & Co.*, 51 Cal. 385.
5. *Parsons v. Sovereign Bank*, 193 A.C. 160, 167; *Bochu v. Goodall* (1911) L. Ch. 155, 161; *Patrick v. Lyan*, 1938 R. 611.
6. *Ram Narayan v. Carey*, 58 C. 174; *Patrick v. Lyan*, 1938 R. 611. but see *Jotindra v. Rajendra*, 8 C.L.J. 114.
7. *Jeffreys v. Dickson*, L.R. 1Ch. 183, 890.
8. *Robinson Printing Co. v. Chic.* (1905) 2 Ch. 123.
9. *Anrit Lal v. Narain Chandra*, 30 Cal. L.J. 515; *Huneswar v. Rahhal*, 18 C.W.N. 366.
10. *Murray v. Currie*, (1870). L.R. 6C.P. 24, 1 Digest 272.
11. (1859), 6 C.B.N.S. 894=2 L.T. 570=8 W.R. 239: 1 Digest, 272:

stevedore, only looking into the hold occasionally to see how the cargo was being stowed, for the safety of the ship. Plaintiff's agent arranged with the broker of the charterer for the freight and carriage to the port of certain sugar-pans, and sent them alongside the ship. Whilst the pans were being hoisted on board from the lighter by the stevedore and his men, two of them were by their negligence damaged. *Held*, in these circumstances the stevedore was not the servant or agent of the master so as to render him responsible.

Commission
agent in
foreign
country

The legal relation between a merchant in one country and a commission agent in another is that of principal and agent and not seller and buyer though this is consistent with the agent and principal, when the agent consigns the goods to the principal, being in a relation like that of seller and buyer for some purposes. The relation is one as between principal and agent, though when the goods are shipped the commission agent stands in contemplation of law as vendor to the principal.¹ A merchant, therefore, in this country who orders out goods through a firm of commission agents in Europe cannot hold the firm liable as if they were vendors for failure to deliver the goods. And the result is the same if the goods are ordered out through a branch in this country of a firm of commission agents in another country.²

Where an agent in England buys for a foreigner resident abroad, a long series of decisions has established that the agent is generally to be considered as pledging his own credit, because it is highly improbable that the seller would have given credit to the foreigner. But where the contract is made in writing expressly with the foreigner, and not with the agent, the latter is not liable. In a simple contract (even a foreign contract) an agent signing for his principal, if acting within the scope of his authority, binds the principal.³

It has been held that where an agent in England contracts on behalf of a foreign principal, he is presumed to contract personally unless a contrary intention plainly appears from evidence contained in the document itself⁴ or in the surrounding circumstances.⁵ If there is no such evidence, the presumption prevails that the agent has no authority to pledge the credit of the foreign principal in such a way as to establish privity between such principal and the other party, and that he is personally liable on the contract. In other words, the rule is one of evidence rather than of law, and the question to be determined is really one of fact.⁶ The agent having no authority to pledge the credit of his foreign principal, the latter is not

1. *Ireland v. Loringston*, L.R. 5 H.L. 395, *Cassaboylon v. Gibb* (1883) 11 Q.B.D. 797.

2. *Mahomedally v. Schiller*, (1889) 13 Bom. 470. The order to the defendants in this case was in the following form: "I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below."

3. *Mahong v. Kekule*, 23 L.J.C.P. 54.

4. *Gadd v. Houghton*, 1 Ex. D. 357.

5. *Glover v. Langford*, 8 T.L.R. 628.

6. *Ribinger v. Clay*, L.R. 8Q.B. 313 *reid*. to in *Harper & Sons v. Keller*, 84 L.J.Q.B. 1696, *Green v. Kopke*, 25 L.J. C. P. 297.

under any liability to the person with whom the commission agent is contracting. In these cases the only liability of the foreign principal is to his own agent and the agent alone is liable to the person with whom he makes the contract. If upon the contract the foreign principal is directly liable to the person with whom the agent contracts, this provision is inconsistent with the custom, and the custom is thereby excluded.¹ In the case of a partner of a foreign firm, buying in this country, under the ordinary rules of partnership transaction the firm is liable, unless as in the case of any other partnership business the vendor elects to rely on the credit of the person who appears in the transaction to the exclusion of the others.²

But the incidents of relationship between a merchant in one country and a firm of commission agents in another may be varied by custom. Thus according to the custom of trade in Bombay when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe at a fixed price and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturers. It makes no difference that the firm receives commission or trade discount from the manufacturers with or without the knowledge of the merchant. The subject will be dealt with in detail in a subsequent chapter under custom of trade.³

Where a commission agent buys goods for a merchant at a price smaller than the limit specified in the indent, he cannot charge any price higher than that actually paid by him,⁴ except in the case of a custom to the contrary.

It is the duty of the commission agent to inform the merchant abroad that his order cannot be carried out because the goods ordered are not available.⁵

When a person undertakes to save on estate from an impending auction sale by putting in an application on behalf of all the co-sharers even though gratuitously, he becomes their agent within the meaning of s. 182 of the Indian Contract Act.⁶

Miscellaneous

A subsequent mortgagee paying off a prior encumbrancer does not act as the agent of the mortgagor.⁷

The position of directors of a public company is that of the agent of the company.⁸ There is nothing to prevent a servant from being an agent if he be employed as such.⁹

In so far as an agent employed by an insurance company fills up the proposal form for the proposer, he is to be regarded

1. *Miller Gibb & Co. v. Smith*, (1917) 2 K. B. 141, 150.

2. *Bottomley v. Nuttall*, 28 L. J. C. P. 110.

3. *Paul v. Chotalal*, (1906) 30 Bom. 1, 23.

4. *Shau v. Baij Nath*, (1897) P. R. No. 21.

5. *Cassabaghian v. Gibb*, 11 Q. B. D. 797, see as to measure of damages for default.

6. *Bhoobun v. Ram*, I. L. R. 3 Cal. 300.

7. *Tota Ram v. Ram Lal*, 54 All. 897 (F. R.).

8. *Wilson v. Bury*, 5 Q. B. D. 518, 526.

9. *Ganeshdas v. Gangaram*, 123 I. C. 228.

as his agent, but not of the former.¹

A direction to pay money to another will not make that other the agent of the person giving the direction, unless it is also directed to be paid on behalf of the person giving the direction and the money has been so accepted by the other person.²

Agency is the creation of a contract, so the President is not the agent of a municipal committee.³ The ordinary doctrines of agency and of master and servant are applicable to corporations as well as to ordinary individuals.⁴

The relation of candidate and agent is much wider than that of principal and agent under the ordinary law and such relationship is to be inferred from the facts.⁵ The case of a *maraldar* is similar.⁶

It has been held that there is no presumption that when a Burmese Buddhist couple is living together, one acts as the agent of the other. It is a question of fact to be determined upon the evidence before the court in each case.⁷

There is a well-marked distinction between the relation of agency and that of trust. An agency may often involve a relation of trust and confidence, and the property in the hands of an agent may sometimes be impressed with a trust for the benefit of a principal.⁸

Plaintiff was a grain merchant at K and defendants were grain merchants at S. The arrangement between plaintiff and defendant was that plaintiff was to send defendants consignments of goods from time to time, defendants were to keep them with them on receiving instruction from plaintiff to that effect were to sell and hand over the sale proceeds less their commission and the money was to be paid at Delhi. Plaintiff sued defendants for accounts in the court at K. *Held*, no part of the cause of action arose at K and that court had no jurisdiction. The suit was not one for account by a principal against the agent. The effect of the understanding was that defendants were to sell the grain in their own right and be responsible to plaintiff as debtors for the sale proceeds. Hence defendant was agent up to the date of sale and thereafter only a debtor pure and simple.⁹

The senior member of a family who merely supervises the collections made by joint tahsildars from joint landed properties, going occasionally to the mahals to help them in cases of difficulty about the collections but not receiving from the tahsildars any money due to any other co-sharer, is not an

1. *Kwa Hui v. Northern Assurance Co.*, 2 Rang. 158=1924 Rang. 269=83 L.C. 569.

3. *Hari v. Taraprasanna*, 79 I. C. 354.

3. *Tanoy M. Committee v. Khoo*, 164 I. C. 410.

4. *Citizens Life Assurance Co. v. Brown*, 1904 A. C. 423, 426.

5. *Rajmat v. Lajpat Rai*, 6, I. C. 353 (Punjab Court of Election Commrs.)

6. *Arunachalam v. Vajiravan*, 57 M. L. J. 628, 632 P. C.

7. *Chettyar Firm v. Than*, 9 Rang. 524.

8. *Kali v. Hari*=(1938), Cal. 1 652.

9. *Kalyanji Kunwarji v. Tirkaran Sheolal*, 1938 Nag. 254=176 I. C. 675.

agent of the members of the family so as to be liable to render accounts to the latter as his principals.¹

The main test whether a person is acting as agent of another so as to make him liable to account or on his own behalf is whether the so called agent is selling his own goods when the time for sale comes or whether he is selling the goods of his principal. Where the defendant had to pay for the goods before he was allowed to sell them it cannot be said that he was ever entrusted with anything for which he was liable to account. The profits from sale were apparently to go into his own pocket.²

See also Art 89 of the schedule to the Limitation Act, 1908, which relates to suits by a principal against his agent for moveable property received by the latter and not accounted for

¹ *Bray Mohun v Abani Kanta*, 1938 Cal 610=42 C W N 1157=177 I C 935

² *Phul Chand Nem Chand v Aggarwal Battery Manufacturing Co*, 1938 Lab 814

CHAPTER III.

CLASSES OF AGENTS.

18. Different classes of agents. 19. Mercantile agents. 20. *Del credere* agents.
21. *Arhatias*. 22. In relation to ships. 23. Bankers.

18. Different classes of agents.

Special
agents and
General
agents.

Under the English law, agents are recognised to be divided into two classes according to the extent of the authority given to them by the principal: (1) *general agents* and (2) *particular or special agents*. They are defined by Bowstead as follows¹ :

A *general agent* is an agent who has authority—(a) to act for his principal in all matters, or in all matters concerning a particular trade or business, or of a particular nature; or (b) to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal; *e. g.*, where a solicitor, factor or broker is employed as such.

A *special agent* is an agent who has only authority to do some particular act, or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of his trade, profession, or business as an agent.

The difference between the two cases (more, however, one of degree than of kind) is with regard to the position of third persons with whom they deal. Such third persons are only concerned with the apparent and not the actual, authority of a general agent. Therefore if a general agent, purporting to act on behalf of his principal, enters into a contract within the apparent scope of his employment, his principal is bound by the contract, notwithstanding any express limitation of the agent's authority which is unknown to the third party with whom he had contracted. For instance, the licensee and manager of a public house owned by a firm of brewers is usually clothed with authority as a general agent to buy articles required for consumption in the public house; and a private prohibition by his employers against bringing cigars does not protect his employers from an action for the price of cigars bought by him from a person who was unaware of the private limitation of the agent's authority.²

But, in the case of a particular agent, a third party contracting with him does so at this own peril, unless he previously ascertains the exact extent of the agent's authority; for a particular agent only renders his principal liable for such acts and defaults as have been actually authorised by the principal, or are reasonably incidental to those authorised by him. For instance, if I, not being a horse-dealer by trade send my servant to you with my horse and authorise him to sell it to you for thirty guineas, but give him no authority to warrant the horse, I am not liable upon any warranty which

1. Law of Agency, p. 2. The distinction between general and special agents is only of importance in determining the nature and extent of the authority conferred.

2. *Watteau v. Fenwick* (1893) L. Q. B. 346.

he may give you.¹ Where, however, an agent contracts within the scope of his actual authority, the principal cannot repudiate the contract, on the ground that the agent was acting in his own, and not in the principal's interest (unless of course the agent and the third party are together engaged in defrauding the principal); even though the extent of the authority was not known to the third party.²

Some writers admit of a third class as well, namely, *universal agents*, that is those who are authorised to do all acts for his principal which can lawfully be delegated to an agent,³ though this will merge into 'general agents' of Bowstead's classification. It is, however, immaterial whether we have two classes or three classes as long as we are clear as to their true status and know the exact nature and scope of an agent's authority. The Indian Contract Act, 1872, does not specifically divide agents into various classes but for practical purposes we may adopt the same classification as under the English law. In fact, agents admit of so many classifications according to the various aspects of the relation that it will not be possible to enumerate all of them here. A knowledge of the most important of them will, however, be necessary for the proper understanding of the subject.

Universal
agents.

There are certain kinds of *general agents* to whom distinctive names are applied. The following are the chief instances:

19. Mercantile agents.

"Mercantile agent" is defined in S. 2 (9) of the Indian Sale of Goods Act, 1930, as meaning 'a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods.' This definition is taken from S. 1 (1) of the English Factors Act, 1889, and is in fact the same except that the word "his" is omitted before the word "business". In view, however, of the words which immediately follow, "as such agent," the omission does not seem to make much practical difference.

Factors, brokers, auctioneers are some of the chief classes of mercantile agents. The expression does not include a mere servant or contractor, or one who had possession of goods for carriage, safe custody, or otherwise as an independent contracting party.⁴ In *Loitther v. Harris*⁵ the plaintiff had a quantity of valuable furniture, including some tapestry, which he wished to sell, and accordingly arranged with one Prior to act as his agent for its disposal. Prior by fraud obtained possession of some of the tapestry, which was at the plaintiff's house, and sold it to the defendant and absconded with the money. The

1. *Brady v. Tod* (1861) 9 C. B. N. S. 52.

2. See Stephen's Commentaries on the Laws of England, (18th Edn.), Vol. III, pp. 104, 105.

3. See Mochem, S. 58; See also Wright's *Principal & Agent*, p. 7; Story on Agency, sect. 19.

4. *Cole v. New Bank*, (1875) L. R. 10 C. P. 372, 373; *U. Ullman v. The Yeet*, 1934 Rang. 198=151 I. C. 413.

5. (1927) 1 K. B. 393, 398.

defendant had acted in good faith. The point for decision was whether Prior was a mercantile agent and it was held that he was. The learned Judge observed in this case: "Various objections have been raised. It was contended that Prior was a mere servant or shopman, and had no independent status such as is essential to constitute a mercantile agent. It was held under the earlier Acts that the agent must not be a mere servant or shopman. I think this is still the law under the present Act. In my opinion Prior, who had his own shop and who gave receipts and took cheques in his own registered business name and earned commissions, was not a mere servant but an agent, even though his discretionary authority was limited. It is also contended that even if he were an agent he was acting as such for one principal only, the plaintiff, and that the Factors Act, 1889, requires a general occupation as agent. This, I think, is erroneous."¹

Factor

Factor—A factor is a mercantile agent whose ordinary course of business is to sell or dispose of goods, of which he is intrusted with the possession or control by his principal.²

Broker

Broker—A broker is an agent whose ordinary course of business is to negotiate and make contracts for the sale and purchase of goods and other property, of which he is not intrusted with the possession or control.³

The difference between a factor and a broker is that in the case of a factor he has the possession of the goods whereas a broker has not. A factor generally sells goods in his own name but a broker generally has not that authority.⁴

A factor receives payment and gives valid receipts, and having the possession of the goods he has an insurable interest in them. For the same reason, he has a lien on these goods for the charges that may be due to him and has in the absence of a contract to the contrary a right to retain security for a general balance of account any goods bailed to him.⁵ A factor makes advances on the goods in his possession. When a factor has made advances and his security is impaired by a fall of the market or any other cause he is invested with a power of sale after due notice to his principal, if the principal does not put his factor in funds to make up the deficit.⁶

Broker for
sale or
purchase.

A broker, on the other hand, is only an agent for the purposes of sale or purchase, on behalf of his principal. According to the usual course of business, he is not entrusted with the

1. See Author's Indian Sale of goods Act, pp. 51 to 53 and the authorities cited therein.

2. Bowstead, p. 3, citing *Baring v. Corrie*, (1818), 2 B. & A. 137; *Stevens v. Bitter*, (1883), 25 Ch. D. 31. According to Story, a factor is an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation—*Story on Agency*, §. 33.

Bowstead, p. 3; Story's definition is as follows:—

A broker is an agent employed to make bargains and contracts in matters of trade, commerce or navigation, between two parties for a compensation commonly called brokerage—*Story on Agency*, §. 33.

4. Sec. 171, Indian Contract Act, 1872.

5. *Jafferbhai L. Chatterjee v. Thomas D. Charlesworth*, I. L. R. 17 Bom. 520.

possession or control of the goods to be sold or purchased, he contracts only in the name of his principal and has been defined as a person making it a trade to find purchasers for those who wish to sell and vendors for those who wish to buy, and to negotiate and superintend the making of bargains between them.¹ In the usual course of his business when he enters into a contract he enters the terms of his purchase or sale in his *memorandum* book. He then makes out a 'Bought Note' and a 'Sold Note' which must be written in identical terms, signs and sends them to the buyer and seller respectively, which notes if they agree will constitute evidence of the agreement between the buyer and the seller. Should the bought and sold notes differ the entry in the broker's book would constitute the contract.² His position and the effect of his contract has been pointed out by Brett J. in *Foulke v. Hollins*.³ Properly speaking a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale the property in the goods even if they belong to the supposed seller may or may not pass by the contract. The property may pass by the contract at once or may not pass till a subsequent appropriation of goods has been assented to by the buyer. Whatever may be the effect of the contract as between the principals in either case no effect goes out of the broker. If he signs the contract, his signature has not effect *as his*, but only because it is in contemplation of law the signature of one or both of the principals. No effect passes out of the broker to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation or assent, neither of which is his. In modern times in England, the broker has undertaken a further duty with regard to the contract of the purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed he passes it to the vendee. In so doing, he still does no more than act as a mere intervenor between the principals. He himself considered as only a broker has no possession of the goods, no power or authority to determine whether the goods belong to buyer or seller or either, no power, legal or actual, to determine whether goods shall be delivered to the one, or kept by the other. He is throughout merely the negotiator between the parties, and, therefore, by the civil law, brokers were not treated as ordinarily incurring any personal responsibility by their intervention, unless there were some fraud on their part.⁴

The broker when authorized to sell or buy, has the implied authority to act on the usages of the market concerned and bind his principal unless such usages are unreasonable or unlawful.⁴ He is not liable on the contract he enters into as a broker even though the name of his principal is not disclosed in the

1 See *Mollett v. Robinson* L. R. 7 C. P. 97. See *Benjamin J.*

2 *Southwell v. Southwell* (1876) 1 C. P. D. 374.

3 L. R. 7 Q. B. 616.

4 *Cropper v. Cook*, (1868) L. R. 3 C. P. 194.

contract note.¹ A custom of the market may, however, make him liable.

A broker is an agent.² Primarily and for some purposes he is the agent of the party by whom he was originally employed. He is also generally the agent of each of the two parties for whom he negotiates.³ But to make him the agent of the other party there must be some words or conduct by which an authorisation to act on behalf of the other party is expressed or is to be affirmatively inferred.⁴ The engagement of a broker is like that of an ordinary agent, but with this difference, that the broker being employed by persons who have opposite interests, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself. Thus his arrangement is two-fold and consists in being faithful to all the parties in the execution of what each of them entrusts him with. *Prima facie* a broker is employed to find a purchaser or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may however make himself a party to the contract of sale or purchase for he can go beyond his position of mere negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. But a person contracting to purchase property and promising damages on default is not an agent of the promisee.⁵

Stock Brokers

There are various types of brokers and one of the most important types one comes across in the mercantile world is the stock-broker. The stock broker is generally a member of the local Stock Exchange. On all exchanges in India, the broker is employed by the client to buy or sell and carries out the bargain by approaching another broker member of the Stock Exchange. The rules of the Stock Exchange make it compulsory for selling as well as buying brokers to be prepared to give delivery of the stock bought or sold, on payment, according to their contract. When a person engages a stock-broker, or any broker who happens to be a member of a market or exchange like the Stock Exchange or Cotton Exchange, the principal who engages him will be presumed to have given him the authority to enter into the contract in compliance with the rules and regulations of his market, and thus all the reasonable customs and rules of the markets concerned which are binding on the broker are also binding upon his principal, whether the principal is aware of them or not. It is usual among brokers to put through transactions in connection with a particular share or stock on behalf of several clients in one transaction and then

1. *Southwell v. Boarditch*, (1876) L. C. P. D. 374.

2. *Suhil Chandra v. Gauri Shankar*, 39 All 81.

3. *Patram v. Kankannarah Co.*, 42 Cal. 1050, 1065, 1066=19 C. W. N. 623=31 I. C. 607.

4. *Handandas v. Mohori Bibi*, 8 I. C. 601=3 Bur. L. T. 17.

5. *Lakshmanan Chetty v. Subramaniam Chetty*, 50 I. C. 69 (Mad)

to split them in his own book, dividing them into as many separate transactions as there are clients for whom he entered into them. This custom has been recognized as binding on the principal by the custom of the Stock Exchange.¹

Auctioneer.

An auctioneer is an agent whose ordinary course of business is to sell by public auction goods or other property, of which he may or may not be intrusted with the possession or control² i. e. of the goods or property to be sold or of the documents of title thereto. Generally speaking, he is the agent for the seller, and therefore can do all such acts as may be necessary in order to auction the goods, and when the goods have been knocked down to the highest bidder, he becomes an agent for the buyer also.³ That is when he prescribes the rules of binding and the terms of the sale, he is the agent of the seller; but when he puts down the name of the buyer, he is the agent for him only.⁴ or to put it otherwise, he is according to established usage until the fall of the hammer, the agent of the seller alone. And on the fall of the hammer, he becomes the agent for both the parties to strike the bargain, and is further authorized as the agent of both the parties to do what is necessary to bind the bargain by a written contract. The seller would be bound by the acts of the auctioneer if he sells contrary to the seller's private instructions in putting up to sale without a reserve price.⁵

Auctioneer.

An auctioneer is expected to sell for cash, otherwise he would have to make good the losses suffered through his having delivered goods on credit. He has an implied authority to receive money against the goods, but with regard to the sale of land he can receive the deposit only, unless expressly authorized to receive the full amount.⁶ The point will be dealt with more thoroughly in the following chapters.

When an auction sale is advertised, it is not to be taken as an agreement to hold the sale, with the result that if the sale does not take place the auctioneer cannot be sued for damages by persons who attend the sale on the ground that their time was wasted or that they incurred expenses in coming to the sale.⁷

An auctioneer may sue in his own name to recover the price.⁸

1 *Scott v Godfrey*, (1902) 2 K B. 726; See Davar's *Elements of Indian Mercantile Law* 10th Edn, p 93

2 Bowstead, p 3. Story defines an auctioneer as "a person authorized to sell goods or merchandise at a public auction or sale for a recompense"—*Story on Agency*, §. 27.

3 *Bell v. Balls*, (1897) 1 Ch. 663; *Simon v Motives*, 3 Burr. 1922; *Hide v Whitehouse*, 7 East 371, *Emmerson v. Heelis*, 3 Taunt, 38, 48.

4 *Williams v. Millington*, 1 H. Bl. 85.

5 *Hawkins v Hawkins*, (1904) 2 K B. 326.

6 Davar, p. 94.

7 *Harris v. Nickerson*, (1873) 8 Q. B. 286.

8 *Wolfe v. Horne*, 2 Q. B. D. 355.

The difference between an auctioneer and a broker is, that the former only sells whilst the latter both buys and sells; ¹ at a private sale he is, however, agent for the vendor only; he is usually paid by commission a percentage on the purchase-money, and where there is no arrangement for payment, he is entitled to reasonable remuneration; and if his employer is aware of his customary charge, he will in general be bound by it.²

20. Del Credere Agent.

A *del credere* agent is one who, in consideration of an extra commission called *del credere* commission, undertakes that persons with whom he enters into contracts on the principal's behalf, will be in a position to perform their duties³ or in other words, agrees to indemnify the principal against loss arising from the failure of a person with whom he contracts on behalf of his principal. He is an agent for the purpose of a sale, and expressly or impliedly guarantees to his principal the solvency of third parties in respect of contracts produced through his agency. Thus an agent for the sale of goods acting under a *del credere* commission, that is, for a higher reward than is usually given, becomes responsible to his principal for the solvency of the vendee; or, in other words, he guarantees, in every case of sale, the payment of the price of the goods sold, when ascertained and due.⁴

A *del credere* agent like any other agent is to sell according to the instructions of his principal and to make such contracts as he is authorized to make for his principal; and he is distinguished from other agents simply in this that he guarantees that the persons to whom he sells at the price at which he is ordered to sell by the principal, then no doubt he guarantees to pay him at that time and he is bound, like any other agent, as soon as he receives the money to hand it over to his principal; but if, according to the contract between him and his principal, he is at liberty to sell at any price he likes, but is to be bound to pay over to his principal at a fixed price and at a fixed time, that is not the relationship of principal and agent but that of vendor and purchaser. Where goods were consigned by A to B for the purpose of sale, and it was agreed that B should have the right to sell at such prices and on such terms as he thought fit, and should pay an agreed price for the goods sold by him within a fixed period after the sale, it was held that the

1. *Wilks v. Ellis*, *arguendo*, 2 H. BL., 557.

2. *Sugd.*, 45. *Rainy v. Vernon*, 9 C. & P. 559; *Meus v. Carr*, 1 H. & N. 488.

3. *Periamanna v. Ramans & Co.*, 1926 Mad. 544—49 Mad. 156—95 I. C. 154; *Venkiiah & Brothers v. Gupta*, 20 Mys. L. J. 194. Bowstead defines a *del credere* agent as follows: "A *del credere* agent is a mercantile agent who, in consideration of extra remuneration, called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contracts on behalf of the principal shall duly pay any sums becoming due under those contracts—*On Agency*, p. 3.

4. *Morris v. C'leasby*, (1816), 4 M. & S., 566, 574; *Gabriel v. C'hurchill*, (1914) 3 K. B. 1272.

relation between A and B was that of buyer and seller, not that of principal and agent.¹

But the mere fact that a person employed to sell goods is allowed by way of remuneration all the profit obtained by him over and above an agreed price, and that he guarantees the payment of that agreed price to the person employing him, does not prevent the relation between them being that of principal and agent, if it appears from the circumstances that their intention was to establish a *del credere* agency.² A *del credere* agency may be inferred from a course of conduct between the parties.³

The principal is not entitled to litigate with a *del credere* agent any disputes arising out of contracts made by him. The obligation of the agent is confined to answering for the failure by the other contracting parties, owing to insolvency, or the like, to pay any ascertained sums which may become due from them as debts.⁴

A firm of merchants appointed sole "banyans" of a company for a certain period to sell all the goods manufactured by the company at such prices as shall be approved by the company and to be responsible to the company for the due payment by the buyers are *del credere* agents.⁵

Certified brokers of the Bombay Native Stock and Shares Brokers Association have been held to be *del credere* agents of their constituents.⁶

It has also been held that the position of a *pakka arhatia* is analogous to that of a *del credere* agent.⁷

A *del credere* agent is liable to indemnify the seller if owing to insolvency of the buyer or other analogous cause the seller is unable to recover the price but not if the buyer refuses to pay on the ground that the seller did not duly perform his part of the contract. If disputes arise between the seller and the buyer, the seller is not entitled to call on the *del credere* broker to litigate those disputes, taking upon himself all the obligations of the buyer and taking to himself all the defences of the buyer.⁸ The liability of the *del credere* agent is a contingent liability, not a liability to perform the contract; it is a pecuniary liability to make good in the event of the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations on the contract. It does not expose the *del credere* agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum

¹ *Esparthe White, re Nevill*, L. R. 9 Ch. 397, 6 Mad. Jur. 275

See also *Toule v. White*, 1873, 29 L. T. 78 H. L.; *Livingstone v. Ross*, (1901) A. C. 327, *Michelin Tyre Co. v. Macfarlane*, (1917) 55 Sc. L. R. 35, H. L.; *Lamb v. Goring Brick Co.*, (1932) 1 K. B. 710.

² *Ex. p. Bright, re Smith* (1879), 48 L. J. Bk 81--10 Ch D 566, C. A. See also *Weiner v. Harris*, (1910) 1 K. B. 285.

³ *Shaw v. Woodcock* (1827), 7 B. & C. 73.

⁴ *Gabriel v. Churchill*, (1914) 3 K. B. 1272 at. *Nouvelles Huileries Anversoises v Munn* (1924), 40 T. L. R. 804; *Churchill v. Goddard* (1935), 40 Com. Cas. 280.

⁵ *Sadagopa v. Tinnevely Mun. Council*, A. I. R. 1927 Mad. 1020=108 I. C. 334

⁶ *Fazal v. Mangaldas*, I. L. R. 46 Bom. 489=1922 Bom. 303=66 I. C. 726

⁷ *Champa v. Firm Tulshi Ram*, 1927 All. 617=105 I. C. 739

⁸ *Thomas Gabriel v. Churchill*, (1914) 1 K. B. 449.

which, as between the seller and the buyer, is an ascertained sum.¹

It has been held under the English law that a commission *del credere* is an absolute engagement to the principal from the broker, and makes him liable in the first instance.² The only effect of a *del credere* commission is to make the factor responsible for the value of the goods to his principal.³ A commission *del credere* is the price given by the principal to the factor for a guarantee: it pre-supposes a guarantee. The obligation of the factor arises on the guarantee. The guarantor is to answer for the solvency of the vendee, and to pay the money, if vendee does not; on the failure of vendee he is to stand in his place and make his default good.⁴ A commission *del credere* imports that if the vendee does not pay, the vendor will: it is a guarantee from vendor to the principal against any mischief to arise from vendee's insolvency. The commission is in the nature of a private agreement between factor and principal and cannot vary the rights subsisting between vendor and vendee.⁵

The vendor of goods through the medium of a broker who has a commission *del credere* cannot recover the price from the broker in a declaration upon an *indebitatus assumpsit* for goods by plaintiff to defendant delivered to be sold, and sold by him.⁶

In *Nouvelles Huileries Anversoises* *S. A. V. Mann* ⁷, plaintiffs bought from the first defendants a quantity of seed under a written contract, which stated that the first defendants, through the agency of the second defendants, acting as *del credere* agents, sold the seed to plaintiffs. The second defendants were paid a commission by the first defendants, and received nothing from plaintiffs. The first defendants were unable to deliver the goods. In an action for damages, held, as the second defendants were not in fact the agents of plaintiffs but only of the first defendants, and as the mere description of the second defendants as *del credere* agents, without any further words making them *del credere* agents of either party in particular, did not make them agents of plaintiffs, the action failed as against the second defendants.

There is nothing at any time to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as the principal ⁸.

21. Arhatias.

The term *adatia* or more correctly '*arhatia*' is a Hindustani term, derived from the Hindustani word "*arh*" which means a

1. *S. C. on app.* (1914) 3 K. B. 1272. In England this has not the effect of bringing his contract within the statute of Frauds, as it is essentially different from a guarantee: *Conturier v. Hastie*, (1852) 8 Ex. 40; *Sutton v. Grey*, (1894) 1 Q. B. 285.
2. *Grove v. Dubois*, (1786) 1 Term Rep. 112=99 E. R. 1002.
3. *Houghton v. Mathews*, (1803), 3 Bos. & P. 485=127 E. R. 263.
4. *Morris v. Cleasby* (1816), 4 M. & S. 586=105 E. R. 943
5. *Hornby v. Lacy*, (1817), 6 M. & S. 166=105 E. R. 1205.
6. *Gill v. Comber*, (1817), 7 Taunt 558, 1 Digest, 290
7. (H. C.) & Co. (1924), 40 T. L. R. 804
8. *International Ry. Co. v. Niagara Parks Commission* (1941) A. C. 328, at p. 342. A. I. R. 1941 P. C. 114.

thing which conceals another thing from view or stands as a protection for it or a thing which stands as security for the payment of a debt or the performance of a certain obligation¹, or briefly a screen or shield or security. Etymologically therefore '*arhatia*' means a person who does the act of '*arhat*, or screening or protecting or securing, i.e. one who by his dealings conceals the principal from view or secures performance of the contracts which he enters into ostensibly on his own behalf but really on behalf of another i.e. the principal.

Arhat is of two systems—*pucci* and *kachi*. According to Bombay market, under *pucca arhat* an up-country constituent sends an order to the *pucca arhatia* to purchase or sell any particular commodity for future deliveries, the price being fixed by negotiations. As soon as the bargain is closed, the *pucca arhatia* is bound to deliver goods at that price on the dates fixed by the contract and failing that he pays the difference between the market price and the contract price. Under *kachi arhat*, the *arhatia* receives an order from his constituent for purchase or sale and sends for a broker to settle the rate. The broker who settles the rate guarantees to bring a party willing to buy or sell at that rate and as soon as that is done a regular contract is entered into between the party and the *arhatia*. If within the period intervening the market rises above or falls below the rate so fixed the profit in the former event goes to the broker on his securing the contract at a higher rate and in the latter case the loss arising through the fall of the market has to be paid by the broker.²

The incidents of these systems will be explained in a later chapter.

22. In relation to ships.

A shipmaster or master of a ship is the chief officer of a merchant ship, having a certificate from the Board of Trade, which is either a certificate of competency obtained in an examination or a certificate of service obtained by his having obtained a certain rank in the service of His Majesty³. As owners rarely navigate a trading ship by themselves, the management of it is generally entrusted to the master, and he is their confidential servant or agent to perform all things relating to the usual employment of the ship.⁴

Master
of ship

The shipmaster is equivalent to *magister navis* in civil law, and has authority to enter into contracts for usual employment of the ship, to contract for repairs and necessaries in a prudent way when he cannot communicate with the owner and when he can in no other way obtain money therefor, and to

¹ *Gauhar Khan v. Ajodhin Singh*, 20 I. C. 870

² See *Bhagwan Das v. Kanya*, I L. R. 30 Bom 205;

Chandulal v. Sidhruthrai, I L. R. 29 Bom 391.

Bhagwan Das v. Burjorji, 15 Bom. L. R. 85=19 I. C. 29;

Manulal v. Radhakishan, 45 Bom. 386=62 I. C. 361. *Harnarayan v. Radhakishan*, 38 Bom. 205; *Chhogonal v. Jainarayan*, 15 Bom. L. R. 750=20 I. C. 882

³ *Moz & Whit. Dictionary*.

⁴ See *Halsbury, Laws of England*, 1st Edn., Vol. XXVI, Art. 117

give a customary bond for such necessities; but this will only bind the owner if given strictly for such necessities and *bona fide*.¹

A master of a ship is the agent, not for the person who happens at any particular time to be the owner of the ship, but for the person or persons who appointed him. In other words, who he is agent for depends on whose agent he has contracted to become, and not on the ownership of the ship.²

Ship
broker

A ship broker is an agent or middleman between the mercantile and shipping communities for the purpose of procuring freight, and of negotiating the sale and purchase of ships³ and effecting charterparties.⁴

Ship's
husband

A ship's husband is a confidential agent (usually a one part owner of a vessel, although he may be a stranger) appointed to conduct or manage on shore whatever concerns the employment of a ship; he has authority to give order for repairs, refitting and the outfit of the ship, to see that she is properly manned, to procure a charter for freight, but not to conceal a charter party, to correspond with the master when abroad on the business of the vessel, to provide for the entry and clearance at the home port, to adjust and receive freight, and to account for and distribute the proceeds among the owners.⁵

23. Bankers.

The term bank is usually accepted as meaning an institution (a company or a firm) receiving money on deposit to be accounted for on demand by means of cheques.⁶ The Indian Companies (Amendment) Act of 1936 defines a banking company as one which carries on as its principal business, the accepting deposits on current account or otherwise, subject to the withdrawal by cheque, draft or order, notwithstanding that it engages in any or more of the sixteen forms of businesses enumerated in S. 277 (F) and any other things incidental or conducive to the promotion and advancement of the business of the company. It is important to bear in mind that the definition of a bank or banking business is different from definitions of companies or individuals who may be included in the definition of a bank so as to subject them to certain obligations which the legislature thinks should be imposed on them. In such cases, it is obvious that the definition will include not only persons who carry on the business of banking but also those who pretend to do so. This has been made explicit and clear by the recent amendment of 1942 (Act XXI of 1942), by which any company, which uses the word 'bank', 'banker' or 'banking' as part of its name, shall be deemed to be

1. See Bowstead, pp. 78 to 83.

2. *Mackenzie v. Pooley* (1856), 11 Ex. 638. See Wright on 'Principal & Agent', p. 151.

3. *MacLachlan on Merchant Shipping*, 188. See Pearson's *Law of Agency*, p. 13.

4. *Cross v. Pagliano*, L. R. 1 Ex. 6; *Allan v. Sundius*, 1 H. & C. 123. *The Nuova Raffarina*, L. R. 3 A. & E., 483.

5. Pearson's *Law of Agency*, p. 14.

6. *Banker's Almanack*

a banking company irrespective of the fact that the business of accepting deposits of money on current account or otherwise subject to withdrawal by cheque, draft or order is its principal business or not.

'Banker' is defined in S. 3 of the Negotiable Instruments Act, 1881, as including also persons or a corporation or company acting as bankers. Hart gives the following definition :

"A banker is one who in the ordinary course of his business honours cheques drawn upon him by persons from and for whom he receives money on current accounts".¹

The primary function of a bank is thus receiving money from or on account of a customer to be repaid on demand or when drawn on by cheque¹. In addition to it, the modern bank will undertake many services for the convenience of its customers. Some of these arise out of, and others are extraneous to, the ordinary business of a bank and they may be grouped, principally, as under—

1. Transfer from one branch or bank to another.
2. Executing standing orders.
3. The receipt of dividends and interest.
4. Collection of coupons and drawn bonds.
5. Safe custody of valuables, etc.
6. Management of securities lodged for safe custody.
7. Night safes.
8. Purchase and sale of securities.
9. The issue and service of loans.
10. Acting as trustee or executor.
11. Acceptance of bills on behalf of customers.
12. The issue of personal and commercial letters of credit.
13. Assisting foreign trade.
14. Acting as reference, supplying trade information, statistics; etc.

The relation between a banker and customer is either that of creditor and debtor or of agent and principal. For instance, where the bankers advance money to their customers as a loan the relation is that of creditor and debtor, and when they receive money as loan on a fixed deposit the relation is *vice versa*, but where money or bills or valuables are taken by the bankers for safe custody or for collection and safe custody of the proceeds for their customers, the relation is essentially that of agent and principal. The bankers hold the money in trust for their customers in the same way as an agent does for his principal and their respective rights and liabilities to each other are similar.² The principal

3. *Law of Banking*, Third Edition, p. 1.

0. Halsbury, vol. I (2nd Edn.), Art. 1148, p. 698; *Foley v. Hill* (1848), 2 H. L. Cas. 28, at p. 43.

2. See Halsbury, Vol. I (2nd Edn.), Art. 1209 p. 735.

functions of a banker in which he stands in a fiduciary relation as agent to his customers are :—

(1) Collection of cheques, bills of exchange, and other documents, for customers.

(2) Payment of cheques, bills of exchange, or other documents, for customers.

(3) Safe custody of valuables of customers.

(4) Discounting bills for customers.

Each of these functions involves rights and liabilities between a banker and customer which require a careful consideration and will be dealt with in a later chapter

CHAPTER IV

CREATION OF AGENCY

24. Who may employ agent. 25. Who may be an agent.
26. Consideration for agency not necessary.
27. How the relation of agency may be constituted

24. Who may employ agent.

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent. (S. 183, *Indian Contract Act, 1872*)

Only major
and of
sound mind
can employ
an agent. •

Section 183 of the Indian Contract Act, 1872, declares that any person who is of the age of majority according to the law to which he is subject, may employ an agent. Converted into a negative proposition, it reads thus: No person who is *not* of the age of majority according to the law to which he is subject, may employ an agent; in other words, a minor is *not competent* to appoint an agent. Section 11 of the Indian Contract Act prescribes that 'every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.' This raises two questions: (1) Is a minor or a person of unsound mind absolutely incompetent to contract, in which case his agreement is *void*, or (ii) is he incompetent to contract only in the sense that he is not liable on the contract though the other party is in which case there is a voidable contract. If the agreement is void, the minor or the lunatic can neither sue nor be sued upon it, and the contract is not capable of ratification in any manner¹; if it is voidable, he can sue upon it, though he cannot be sued by the other party, and the contract ratified by the minor on his attaining majority. It has been ruled by the Privy Council that the Indian Contract Act makes it essential that all contracting parties should be competent to contract. It was accordingly held that a mortgage made by a minor is void, and a money lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money under Ss. 64 and 65 on a decree being made declaring the mortgage invalid.²

As regards the competency of a minor to appoint an agent, it has been held that a minor principal is not bound by the acts of his agent unless the latter be his legally constituted guardian and even then under certain specified circumstances.³ It has been stated as a general proposition that capacity to contract or do any other act by means of an agent is co-extensive with the capacity of the principal himself to make the contract or do the act which the agent is authorised to make or do. Provided that, where capacity to do a particular act

Minor
principal.

1. *Surnaj Narain v. Sukhu Ahir*, (1928) 51 All 164=112 I. C. 159=1928 All. 440
2. *Mohori Bibee v. Dhurmodas Ghose*, (1903) 30 L. A. 114=30 Cal. 539 followed in *Mir Sarwarjun v. Fakhruddin Mahomed*=(1912) 39 Cal. 232=13 I. C. 331; *Ma Hint v. Hashim* (1920) 22 Bom. L. R. 531=55 I. C. 793.
3. *Prakash Chand v. Strauss & Co.*, 1928 Lah. 854=109 I. C. 336.

exists only by virtue of a special custom, the act cannot be done by means of an agent unless the custom warrants its being so done.¹ Accordingly, it has been held that an infant or lunatic is bound by a contract made by his agent with his authority, where the circumstances are such that he would have been bound if he had himself made the contract.² The relation of principal and agent, as has been seen, is created primarily for the purpose of investing an agent with authority to act for or represent the principal in dealings with third persons. His purpose is ordinarily to bring about, or in some way to effect or modify, contractual relations between his principal and third persons. For the time and to the extent limited, the agent is to be the *alter ego* of the principal; his act is, in law, to be the act of the principal and the capacity and character in which the agent is to act are those of the principal.

It follows, as a necessary conclusion, that the same kind of degree of legal capacity which would be requisite were the principal present and acting in his own person, are in general necessary when he is not present and acts in the form of his agent.³ For instance, under S. 68 of the Indian Contract Act, if a person, incapable of entering into a contract, or any one whom he is legally bound to support is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed for it from the property of such lunatic or infant, notwithstanding the provisions of S. 183 of the Act.

The converse proposition is also generally true, *viz.* whatever a person has no power to do himself, he cannot do by means of an agent.⁴

It is thus settled law that a minor cannot empower an agent or attorney to act for him⁵ except perhaps to plead his minority which he himself could do.⁶ The rule has been very ably put by the learned editors of the American Leading Cases in the following words:—

“The constituting of an attorney by one whose acts are in their nature voidable is repugnant and impossible for it is imparting a right which the principal does not possess, *viz.* that of doing valid acts. If the acts when done by the attorney remain voidable at the option of the infant the power of attorney is not operative according to its terms. If they are binding upon the infant, then he has done through the agency of another what he could not have done directly, *viz.* binding acts. The fundamental principle of law in regard to infants requires that the infant should have power of offering such acts

1. Bowstead, p. 4.; Halsbury, 1st Edn, Vol. II, S. 328—Whatever a person has power to do himself he may do by means of an agent; *Mechem*, S. 129

2. *R. v. Longnor* (1833), 4 B & Ad 647; *Daily Telegraph Newspaper Co v M Laughlin*, (1904) A. C. 776, P. C.; See Bowstead p. 5. and other authorities cited therein.

3. *Mechem*, S. 129.

4. *Ibid.*

5. *Mechem*, S. 14; Bowstead, pp. 4 & 5.

6. *Kari Doss v. Kannim Satt*, 16 Mad. 344

done by the attorney as he chooses and avoiding others, at his option, but this involves an immediate contradiction, for to possess the right of availing himself of any of the acts, he must ratify the power of attorney and if he ratifies the power all that was done under it is confirmed. If he affirms part of a transaction he at once confirms the power and thereby against his intention affirms the whole transaction. Such personal and discretionary legal capacity as an infant is invested with is, therefore, in its nature, incapable of delegation and the rule that an infant cannot make an attorney is perhaps not an arbitrary or accidental exception to a principle, but direct logical necessity of that principle. But if the considerations suggested as the foundation of this rule be not satisfactory, the rule itself is established by a conclusive weight of authority."¹

It is, however, to be observed that in India contracts by infants are void and not voidable.² The English and American cases laying that such contracts are voidable only, and not void, will not be applicable in this country. In *Great American Insurance Co. v. Madanlal Saudal*,³ the *de facto* guardian of a minor had entered into a contract on the minor's behalf for the purpose of insuring property belonging to the minor. It was held that the guardian had authority to effect the insurance and that being so that the minor for whose benefit it was made could sue on it in his own name in order to recover on the policy. The comments of Pollock and Mulla on this case are as follows:—

"The principle on which this decision is based is not altogether easy to understand. If the guardian contracts as the minor's agent, it is the minor's contract and therefore a nullity. If it is the guardian's contract, he should alone be entitled to sue, though he may be under an obligation to hold any benefit under the contract for the minor's benefit. The court expressly disclaimed any intention of following such cases as *Madhab Keori v. Baikuntha Karmaker*⁴ and *Rose Fernandes v. Joseph Gousalves*,⁵ but it is not very easy to distinguish them; and all these cases seem to have been really decided on the ground that the contract was for the infant's benefit and that it would be unjust in the circumstances to deprive the latter of that benefit. But there is nothing in the Indian Contract Act corresponding to the rule of English law (saved by the Infants Relief Act, 1874), which makes a contract for the infant's benefit enforceable; all contracts in India made by an infant are void."⁶

In India, the Indian Majority Act, 1875 (Act XI of 1875) determines the age of majority. S. 3 of the Act declares that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of

The Indian
Majority
Act, 1875.

1. The American Leading Cases 305 (5th Edn.)

2. *Mohori Bibee v. Dhurmodas Ghose*, (1903) 30 I. A. 114=30 Cal. 539; followed in *Mir Sarwarayan v. Fakhruddin Mohd.* (1912) 39 Cal. 282=13 I. C. 331; *Ma Hui V. Hashim* (1920) 22 Bom. L. R. 531=55 I. C. 793. See also Pollock & Mulla, pp. 60, 61.

3. (1935) 59 Bom. 656=37 Bom. L. R. 461=158 I. C. 554=1935 Bom. 353.

4. A. I. R. 1919 Pat. 561.

5. A. I. R. 1924 Bom. 97.

6. Pollock & Mulla, *Indian Contract and Specific Relief Acts*, 7th Edn. p. 64

eighteen years, and not before. In the case, however, of a minor of whose person or property a guardian has been appointed by a court, or of whose property the superintendence is assumed by a court of Wards, before the minor has attained the age of eighteen years, the Act provides that the age of majority shall be deemed to have been attained on the minor completing his age of twenty one years. S. 2 of the Act declares that nothing in the Act contained shall affect the capacity of any person to act in matters of marriage, dower, divorce, and adoption. An order discharging the guardian of a minor under S. 48 of the Guardians and Wards Act, 1890, does not terminate the minority when it is obtained by fraud practised upon the court by a third party.¹

"Law to which he is subject."

The age of majority enabling a person to employ an agent is to be determined according to the law to which he is subject. The general principle of English law is that the capacity of a person to enter into a contract is decided by the law of his domicile, and not the law governing the substance of the contract: but the later trend of authority is not to recognize the law of domicile as having an exclusive prerogative in all cases; and there is a body of English opinion in favour of the *lex loci contractus*, the place where the contract is made, in the case of what are usually described as ordinary mercantile contracts, while in the case of contracts relating to land the *lex situs*, the place where the place is situated has a prior claim.² In *Kashiba v. Shripat*³ a Hindu widow above the age of sixteen and under the age of eighteen years, whose husband had his domicile in British India, executed a bond in Kolhapur (outside British India,) where she was then residing. As the widow had not changed her domicile after the husband's death, her domicile was the same as that of her husband at his death, namely British India. The question arose whether her liability on the bond was to be governed by the law of Kolhapur (*lex loci contractus*), or by the law of British India (law of her domicile). According to the law obtaining in Kolhapur, which is Hindu law unaffected by the Contract Act, she would have been liable on the bond, as the age of majority according to that law is sixteen years, and the bond was executed after she completed her sixteen years. According to the law in British India, namely, the Contract Act, she was not liable, as the contract was made when she was under the age of eighteen years, and was not ratified by her after she attained her majority. It was held that her capacity to contract was regulated by the Contract Act, being the law of her domicile, and that under the Act she was not liable on the bond. But the Madras High Court has held that where a person aged eighteen domiciled in British India endorsed certain negotiable instruments in Ceylon, by the laws of which he was a minor, he was not liable as an endorsee, the contract being a mercantile one and governed by the *lex loci contractus*.⁴

1 *Subramaniam v. Doraisinga* (1913) 24 Mad. L. J. 49=16 I. C. 943

2 See Pollock & Mulla, p. 62 and authorities cited therein

3 (1894) 19 Bom. 697 See also *Rohilkhand and Kumaun Bank, Ltd. v. Roor* (1885) 7 All. 490

4 *T.N.S. Firm v. Mohd. Hussain*, A.I.R. 1933 Mad. 756=65 Mad. L.J. 458=146 I.C. 608

As it is now finally settled that a minor's agreement is void, it follows that there can be no question of ratifying it.¹ Thus, a promissory note given by a person on attaining majority in settlement of an earlier one signed by him while a minor in consideration of money then received from the obligee cannot be enforced in law. Such a note, the Madras High Court holds, is void for want of consideration.²

Ratification

S. 115 of the Indian Evidence Act, 1872, enacts that 'when one person has, by declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.' If a minor procures a loan or enters into any other agreement by representing that he is of full age, is he estopped by S. 115 of the Evidence Act from setting up that he was a minor when he executed the mortgage? The point was raised, but not decided in *Mohori Bibee's* case.³ In that case the Privy Council said: "The Courts below seem to have decided that this section does not apply to infants: but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy." There were many conflicting decisions whether a minor could be estopped by a false representation as to his age. But the question is now settled by the case of *Sadik Ali Khan v. Jai Kishore*⁴ where the Privy Council observed that a deed executed by a minor is a nullity and incapable of founding a plea of estoppel. The principle underlying the decision is that there can be no estoppel against a statute. The Bombay High Court has since this case reversed its former course of decisions.⁵

Estoppel

Section 183 of the Indian Contract Act, 1872, also states

Incompetency due to unsound mind.

1. See *Gorind Rofi v. Piranditta* (1935) 16 Lah. 456=158 I. C. 243=1935 Lah. 561 (F. B.); *Nazir Ahmad v. Jiran Das*, 1936 Lah. 159=177 I. C. 388
2. *Indrau Ramaswami v. Anthrappa Chettiar*, (1906) 16 Mad. L. J. 224, *Arunagan v. Durassingu* (1914) 37 Mad. 38=12 I. C. 568; *Suraj Narain v. Sukhu Ahir*, 1928 All. 440. The view expressed in a Calcutta case, *Kundan Bibi v. Sree Narayan*, (1906) H. C. W. N. 135, and followed in *Karam Chand v. Basant Kaur*, 31 P. R. 1911 has not been accepted as sound. See *Pollock & Mulla*, p. 70, *Bhola Ram Harbans Lal v. Bhagat Ram*, 1927 Lah. 24; *Karim Khan v. Jaikaran Godadmal*, 1937 Nag. 390. The decision in *Narain Singh v. Chiranyi Lal*, 1924 All. 730 also seems of doubtful validity.
3. (1903) 30 I. A. 114, 122=30 Cal. 539, 545, referred to by Lord Sumner in his judgment in *R. Leslie, Ltd. v. Sheill* (1914) 3 K. B. 607, at p. 615; *Lal Dhar v. Pirarey Lal* (1921) 19 All. L. J. 578=62 I. C. 258.
4. A. I. R. 1928 P. C. 152=30 Bom. L. R. 1346=109 I. C. 387.
5. *Gadigeppa v. Balaswanda* (1931) 55 Bom. 741=135 I. C. 161=1931 Bom. 561. Earlier cases are: *Kankaya Lal v. Girdhari Lal*, 13 I. C. 956; *Vaikuntaram v. Authimoulam*, 38 Mad. 1071=23 I. C. 799; *Gulam Abidin v. Hem Chandra*, (1916) 20 C. W. N. 418=32 I. C. 388; see *Pollock & Mulla*, p. 68.

that even a major person who is of sound mind only may employ an agent. A person of unsound mind therefore even if he is major is not competent to appoint an agent. This is also in consonance with the rule laid down in section 11 of the Act which states that every person who is major and who is of sound mind and is not disqualified from contracting by any law to which he is subject is competent to contract.

A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.¹

Under English law, lunatics are, generally speaking, incapable of being principals, for they cannot contract; but if a person has made a contract with a lunatic in ignorance of his state of mind, the courts refuse to upset it or declare it void and it is immaterial whether it is executed or executory. The burden of proof is on the person wishing to upset the contract to prove that the lunatic was known to be insane by the other party at the time of contracting.² If a person were to act as agent for a lunatic after he knew of his lunacy and his incompetency to act, he would be liable to be sued for a breach of warranty of authority by anyone who had been misled thereby.³

Thus by English law a lunatic's contract is not void, but voidable at his option, and this only if the other party had notice of his insanity at the time of making the contract. But in India, after the decision that section 11 of the Indian Contract Act makes a minor's agreement wholly void,⁴ it is clear that a person of unsound mind must in British India be held absolutely incompetent to contract.⁵

As in the case of minors, a lunatic's estate is liable *quasi ex contractu* for necessities supplied to him or to any one whom he is legally bound to support in good faith,⁶ and it has been held that this applies to all expenses necessarily incurred for the protection of his person or estate, such as the cost of the proceedings in lunacy.⁷

1 S. 12, Indian Contract Act, 1872.

2 *Imperial Loan Co v Stone* (1892), 1 Q B 559, *Molton v Cammoux* (1849), 4 Ex 17; *Bearen v Mc Donnell* (1853), 9 Ex 309.

3 *Drew v Nunn* (1879), 4 Q B D 661.

See Pollock & Mulla p. 72. In America also the prevailing view is that such a contract is voidable at the option of the person of unsound mind, see *Katzen* p. 33, *Mechem*, S. 134, wherein it is held that an executed contract fairly made in ignorance of the insanity, cannot be set aside on the part of the insolvent party, unless he restores what he may have received under it. Even in America and England contracts entered into after adjudication of insanity are generally held void.

4 *Mohori Bibee v. Dhurmodas Ghose*, (1903) 30 I. A. 114—30 Cal 539.

5 See *Machaima v. Usman Beari*, (1907) 17 Mad L J 78, *Kamola Ram v. Kaura Khan*, 41 P. R. 1912.

6 S. 68, Indian Contract Act, 1872.

7 See Pollock on Contracts, 9th Edn., p. 97 and the authorities cited therein.

It has been held under the English law that a person of unsound mind cannot authorise an agent to alter the provisions of a settlement,¹ or give a power of attorney authorising the transfer of shares in a limited company.² But a person of unsound mind may be treated as a principal where the third party has no knowledge of, and takes no advantage of, his condition.³ A lunatic may act during a lucid interval but if a person of sound mind, who is a principal, becomes a lunatic, the agency determines, except as to persons who have dealt in good faith in ignorance of the insanity.⁴ Unlike English law, in India the question whether the other party had or had not the knowledge of such fact does not arise.⁵

The test of unsoundness of mind is whether the person is capable of understanding the business and of forming a rational judgment as to its effect upon his interest. There being a presumption in favour of sanity, the person who relies on the unsoundness of mind must prove it sufficiently to satisfy this test.⁶ Where a person is not proved to be a lunatic on inquiry, it is necessary to rebut the general presumption of sanity. This can be done by proving that his mind was completely deranged so that he was incompetent to enter into any contract, or by proving that he was of unsound mind with regard to the particular transaction.⁷ But when a person has been found lunatic by inquiry, so long as the inquiry has not been superseded, he cannot, even during the lucid interval, enter into a valid contract.⁸

It has been held that mere weakness of mind is not sufficient. Although it is not necessary to prove utter mental darkness or congenial idiocy,⁹ the party alleging unsoundness of mind of a person must establish that that person was incapable of understanding business and forming rational judgment as to its effect.¹⁰ Mere temporary forgetfulness is not sufficient to indicate want of mental capacity.¹¹

The second paragraph of section 12 of the Indian Contract Act provides that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

Contract in
lucid
interval
burden of
proof.

1 *Elliot v Ince* (1857) 7 De G. M. & G. 475 at p. 487; 33 Digest, 135, 126, (alteration for his benefit); but see as to contracts for his benefit. *Re Walden, Ex parte Bradbury* (1839), Mont. & Ch. 625, at p. 633.

2 "Daily Telegraph" Newspaper Co. v. Mc Laughlin, (1904) A. C. 776; 33 Digest, 135, 124.

3 *The Imperial Loan Company v. Stone*, (1892) 1 Q. B. 599, C. A. *Elliot v Ince* 26 L. J. Ch 821, see Halsbury, Vol. I [2nd Edn.], p. 197.

4 *Drew v. Nunn* (1879), 4 Q. B. D. 661, C. A.; Halsbury, Vol. I, (2nd Edn.), p. 197, f. n. (e); see also S. 12, Indian Contract Act, 1872.

5 See *Machaima v. Usman*, 17 Mad. L. J. 78.

6 *Hall v. Warren*, (1804) 9 Ves. (Jun.), 605, 611, toll. in *Mahomed Yakub v. Abdul Quddus*, 1923 Pat. 187=68 I. C. 372.

7 *Monosseh v. Shapurji*, 10 Bom. L. R. 1004.

8 *Subba v. Solaiappa*, 56 Mad. 904=1933 Mod. 624=147 I. C. 479.

9 *Tirumagal v. Ramasami*, 1 M. H. C. R. 224; *Ram v. Laljee*, 8 Cal. 149; *Drew v. Nunn*, (1879) 4 Q. B. D. 661.

10. *Mohomed Yakub v. Abdul Quddus*, 1923 Pat. 187.

11 *Sarbamohan v. Manmohan*, 1933 Cal. 488=143 I. C. 757=37 C. W. N. 149.

Where the executant is not alleged to be generally insane with lucid intervals but rather that he had from time to time attacks of insanity, the *onus* is on the defendant to show at the time there was an attack of insanity which made the executant incapable in law of executing the document.¹ Where an insane person is proved to have lucid intervals, the burden of proving that he was of unsound mind at the time of the execution of a document is heavily on the person challenging the validity of document.² Where the unsoundness of mind has been proved by definite expert evidence the allegation of a lucid interval has to be strictly proved.³ Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it. In cases, however, of drunkenness or delirium from fever or other causes, the *onus* lies on the party who sets up that disability to prove that it existed at the time of the contract. Questions of undue influence and of incapacity by reason of unsoundness of mind must not be mixed up, involving as they do totally different issues.⁴

The question may arise whether a lunatic adjudged to be so under the Indian Lunacy Act, 1912, and of whose property a committee or manager is appointed, can contract during intervals of sound mind. In England, a lunatic not so found, or before he is so found, by inquisition is not by reason of that fact absolutely incapable of contracting, though the burden of proof in such a case is on the party maintaining that he is not insane, or that contract was made during a lucid interval,⁵ and the same would appear to be the law in India. Where, however, a committee or a manager of the estate of lunatic adjudged to be appointed under either of the Indian Acts, no contract can be entered into by a lunatic in respect of his estate, even though at the time of the contract he may be in a lucid interval. Similarly, it is now settled in England that a person found lunatic by inquisition is incapable of dealing with his property *inter vivos* while the inquisition is in force.⁶

Guardian
of a minor
or a com-
mittee or
manager of
a lunatic.

It is to be observed that the position of a guardian of a minor or a committee or manager of a lunatic is sometimes confused with that of an agent. A guardian or a committee or a manager is not an agent in the strict sense of the term but acts by virtue of certain powers vested in him by law or by the court by which he is appointed and although in some cases and certain treatises a guardian has been called an agent of the minor by contract or by operation of law, it is only a loose expression due to only a one-sided view of the position of an

1 *Lakshminath v. Benares Bank*, 115 I C 201

2 *Tilok v. Mahondra*, 144 I C 741.

3 *U Aung Yu v. Ma E Mai*, 1932 Rang 24=137 I C 766, see also *Turachand v. Mst Phaguma*, 3 C P. L. R. 135.

4 *Sayad Muhammad v. Fetteh Mohd.*, [1894] 22 I. A. 4, p 10; 22 Cal. 324; *Durga Bakesh Singh v. Mirza, Mohd. Ali Beg*; [1904] 31 I. A. 235

5 *Hall v. Warren*, [1805] 9 Ves 605; 7 R. R. 306, *Mohanlal Madangopal v. Vinayak*, 1941 Nag. 251=196 I C. 660

6 *Re Walker* (1905) 1 Ch 160 C A; See Pollock and Mulla, pp. 75 76.

agent, namely, representation of the minor to third persons, other elements being missing.¹

Section 11 of the Indian Contract Act, 1872, also states that a person disqualified from contracting by any law to which he is subject, is not competent to contract. The capacity of a woman to contract is not affected by her marriage either under the Hindu or Mohammadan law. A Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract; and marriage, whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect. It is not necessary to the validity of the contract that her husband should have consented to it. In the same way a married Mohammadan woman is not by reason of her marriage disqualified from entering into a contract.²

Persons
otherwise
disqualified
from contr-
acting-
married
women.

As regards persons of other denominations, we have to consider S. 20 of the Indian Succession Act, 1925, and the Married Women's Property Act, 1874. Both these enactments apply to the whole of British India, but neither of them applies to any marriage one or both of the parties to which professed, at the time of the marriage, the Hindu, Mohammadan, Buddhist, Sikh, or Jain, religion. S. 20 of the Indian Succession Act provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. The effect of this was that on or after January 1st, 1866, all married women to whose marriages the Act applied became absolute owners of all property vested in, or acquired by them, and their husbands did not by their marriage acquire any interest in such property. It was subsequently considered expedient to make due provision for the enjoyment of wages and earnings by women married before 1866³, and the Married Women's Property Act enacted that the wages and earnings of any married woman acquired or gained by her after the passing of that Act in any employment, occupation, or trade carried on by her, and all money or other property acquired by her through the exercise of any literary, artistic, or scientific skill, should be deemed to be her separate property.⁴ The Act also provides that a married woman may sue and may be sued in her own name in respect of her separate property,⁵ and that a person entering into a contract with her with reference to such property may sue her and to the extent of her separate property recover against her, as if she were unmarried.⁶

These two enactments thus create the separate property of married women to whom these apply and impliedly confer upon them, as an incident of such property, the capacity to contract in respect thereof.

¹ See Katar, p. 36

² See Pollork & Mulla, p. 73.

³ See the preamble to the Married Women's Property Act, 1874

⁴ S. 4.

⁵ S. 7.

⁶ S. 8, See Pollock & Mulla, p. 73.

Drunkenness.

Intoxication clearly is intended to have an effect upon contract, as appears from illustration (b) to S. 12 of the Contract Act.¹ The stage of intoxication there referred to as affecting a contract is, that the person must be so drunk as to be unable to understand the term of the contract or form a rational judgment as to its effects, on his interests. This appears to be also the law in England on the subject, as laid down by Chief Baron Pollock in *Gore v. Gibson*² who says: "The, authorities on the subject are collected in Kent's Comm., p. 451, where the learned author observes that although formerly it was considered that a man should be liable upon a contract made by him when in a state of intoxication on the ground that he should not be allowed to stultify himself, the result of the modern authorities is that no contract made by a person in that state, when he does not know the consequences of his act, is binding upon him. That doctrine appears to me to be in accordance with reason and justice;" the Chief Baron then pointed out that with regard to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between express and implied contracts. It appears that in this case the court were of opinion that a contract made by a man in such a state of drunkenness was void; but in *Mathews v. Baxter*³ it was held that the contract of a man too drunk to know what he was about, is voidable, and not void and therefore capable of ratification when he becomes sober. In India, however, such a contract is void, and a man so drunk as not to be able to understand the terms of the contract, or form a rational judgment as to effect on his interest cannot contract at all while such drunkenness lasts. In all such cases the test to be applied is what was the mental condition of the contracting party at the time when the contract was entered into. The presence or absence of the capacity on account of state of the mind as mentioned in section 12 of the Contract Act at the time of making the contract is in all cases a question of fact.⁴ In cases of drunkenness or delirium from fever or other causes, as already stated, the onus lies on the party who sets up that disability to prove that it existed at the time of the contract.

Alien enemy

Aliens are under no disability, and can therefore be principals.⁵ An alien enemy has as well a capacity to act as agent provided the contract of agency was entered into before the hostilities broke out and provided the purpose of agency is not contrary to the policy and interests of the Government of the agent's residence though the principal be an enemy resident under the hostile Government.⁶

1 It is as follows:—

A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

2 13 M. & W. 623.

3 L. R. 8 Ex. 132.

4 *U Aung Ye v. Ma E. Ma*, 1932 Rang. 24=137 I. C. 766; *Tilok Chand v. Mahandru*, 1933 Lah. 458=144 I. C. 741; *Mst. Hazrabi v. Mst. Fatmabi*, 1938 Nag. 201=177 I. C. 80.

5 Wright on 'Principal & Agent,' p. 14.

6 Mechem, §. 175; See *Katkar*, p. 39.

The disability of alien enemies to sue in our courts without licence is a matter of general public policy not coming under this head.

The capacity of a corporation or incorporated company to contract or do any other act is limited by its objects, to be ascertained from the terms of the instrument of incorporation. So far as it can act or contract at all, it can necessarily only do so through an agent¹. A corporation or incorporated company has thus no capacity to appoint an agent for any purpose or to do any act beyond the scope of its charter or memorandum of association².

25. Who may be an agent.

As between the principal and third persons any person may become an agent but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.³ (*S. 184, Indian Contract Act, 1872*).

An act done by an agent, as such, is deemed to be the act of the principal who authorised it, the agent being looked upon merely as an instrument; hence the rule that a person who has no capacity, or only a limited capacity, to contract on his own behalf is competent to contract so as to bind his principal. An income-tax notice delivered by a postal peon to the assessor's son who was a minor and possessed of ordinary intelligence has been held to be a good service on the assessee.⁴ In *Foreman v. G. W. Ry.*⁵ where an agent who was unable to read, was authorised to enter into and sign a contract on his principal's behalf, it was held that the principal could not avoid a written contract made by the agent, on the ground of his inability to read it.

It is to be observed that according to the principle laid down in S. 184 of the Indian Contract Act, even soundness of mind is not necessary and a person of unsound mind can be employed as agent. The principle laid down in the Indian Contract Act thus in this respect goes even beyond that laid down under the English law and appears to be a more correct expression of law. A person choosing to negotiate a contract with another through a lunatic does so at his own risk and cannot seek shelter in his own mistake if the contract turns out to be more onerous for want of soundness of mind of his agent.

¹ Halsbury, (2nd. Edn.), Vol. I Art. 351, p. 198.

² See *Bowstead*, p. 5, and authorities cited therein.

³ The English law on the subject is thus stated by Bowstead: 'All persons of sound mind, including infants and other persons with limited or no capacity to contract or act on their behalf, are competent to contract or act as agents. Provided that—

(a) no party to a contract is competent to sign a contract, or a note or memorandum thereof, as the agent of another party thereto, so as to satisfy the provisions of the Statute of Frauds, § 4, the Sale of Goods Act, 1893, § 4, or the Law of Property Act 1925, § 49;

(b) the personal liability of the agent upon the contract of agency, and upon any contract entered into by him with any third person, is dependent on his capacity to contract on his own behalf—*Law of Agency*, p. 5.

⁴ *In re L. C. Desonza* (1932) 54 All 548—138 I.C. 70—1932 All. 374.

⁵ (1878), 38 L.T. 851.

The law will, in such a case, estop him from pleading his own mistake in defence. This is only a logical deduction from the maxim *qui facit per alium, facit per se*.

Though a minor cannot employ an agent, a minor may be employed as an agent. If he is employed as an agent, the principal would be bound by his acts, because the employment was the principal's own choice. This is not in conflict with the provisions of section 11 of the Indian Contract Act, because though the minor as such has no contractual capacity, it is the capacity of the principal to enter into a contract which determines the binding nature or otherwise of the contract.¹ A minor may become a partner in a partnership and in that capacity as agent of the partnership can bind his co-partners by executing a promissory note on behalf of the partnership.² Similarly, where a minor who was a member of a firm constituting himself and his father applied for shares in a Bank and paid an advance on application whereupon shares were duly allotted to the firm by the Bank, *held*, that the minor was competent to act on behalf of the firm and that it accordingly became liable on the shares.³

It is thus clear that as the contract of the agent is not his contract but that of the principal, there is not need for his being *sui juris*, and even married women and infants may be agents and so also a person of unsound mind.

Personal liability of the agent minor or of unsound mind

Although any person whether minor or of unsound mind can be employed as agent, yet the relation thus created is not perfect inasmuch as although an infant or a lunatic may bind his principal to the third parties by his acts and although the principal is bound by his contract with such infant or lunatic, yet the infant or lunatic agent may escape the liabilities to the principal and to third persons with whom he contracts for his principal which an agent of the age of majority and of sound mind could not. The second part of the rule laid down in section 184 of the Indian Contract Act clearly prescribes that no person who is not of the age of majority and of sound mind can become an agent so as to be responsible to his principal according to the provisions in that behalf contained in that Act, and for this reason that such persons are taken to have no legal discretion or understanding to bestow on the affairs of others any more than upon their own. It has accordingly been held that though a minor may be employed as an agent and the principal would be bound by his acts the protection that is thrown round the minor is not taken away. A minor cannot incur a liability on any contract of agency with his principal and he is not responsible for the loss caused by the negligence of his guardian nor for tort arising out of it.⁴

The protection which the law affords to the principal and to third persons in contracts through agents in cases where the

1 *Prakash Chand V. Strauss & Co.*, 1924 Lah. 147-109 I. C. 53.

2 *Mang Amg Gaur V. Hari Dutt Saraff & Co.*, 42 I. C. 98 (Bom.).

3 *Firm of Gopal Mal V. Jain Bank*, 45 I. C. 17-38 P.W.R. 1918.

4 *Gopal V. Dinkar*, I.L.R. 40 Al. 507-10 All. L.J. 301-40 I. C. 923.

agents are *sui juris* is thus totally wanting in the cases where the agents are minor or of unsound mind.¹ A person appointing, therefore, a minor or a person of unsound mind as his agent, would be bound by his acts if carried out within the scope of the authority given; and could take advantage of contracts entered into by him with third parties, but would be unable to obtain damages from such agent for any loss or injury sustained by his negligence, want of skill or diligence.²

Although a person may be otherwise fully qualified to act as an agent, he is forbidden to act as agent in cases in which his interest is opposed to that of his principal. No man can, as says Lord Cairns,³ acting as agent, be allowed to put himself into a position in which his interest and his duty will be in conflict.⁴ And this arises from the fact that an agent is supposed to make use of all his zeal, integrity, and vigilance for the exclusive benefit of his principal. Thus an agent cannot, in a sale made by him, on behalf of his principal, himself become the purchaser at such sale; nor can he when acting as a purchaser on behalf of his principal, sell his own goods to his principal.⁵ And this rule applies both to agents for reward, and to gratuitous agents.⁶ A person may have already been appointed as an agent to sell something at the best price, and another person may wish to appoint him agent to buy the particular subject as cheap as possible and at the best time for so doing. In such a case if the agent for No. 1 attempted to act for No. 2, he would be committing an absolute fraud on both parties.⁷

Personal dis-
qualification
to act
agent.

It has been held under the English law that where a person has assumed to act as agent when he has a contrary interest to that of his principal, the contract made by him is voidable at the principal's option and even if the latter adopts it he is not liable to pay the agent for his services.⁸ Where an agent has an interest in the subject matter of the agency, it is duty to make a full disclosure of the exact nature of his interest, and the onus is on him to prove he has done so.⁹ While he is agent he will not be allowed to act contrary to his principal's interests. Thus a solicitor who, as administrator of an insolvent estate, could have paid in full a debt owed to himself out of the estate in preference to the other debts, was not allowed to do so, because he acted as solicitor for a creditor of the estate in an

1. See also Mechem, §. 155, and cases cited therein.

2. See Pearson's *Law of Agency*, p. 4.

3. *Parker v. Mc Kenna*, L.R. 10 Ch. D., (118).

4. In this case the directors, who had allotted to a nominee shares of the company, and then brought them from him and re-sold them at a profit, were held bound to account for such profit.

5. *Loether v. Loether*, 13 Vin., 103; *Massey v. Davies*, 2 Ves., 317; *Bentley v. Craven*, 18 Beav. 75; *In re Cape Breton Co.*, L.R. 26 Ch. D., 221.

6. *Proof v. Hines*, Forrest, III, S. C.; See Pearson's *Law of Agency*, p. 4.

7. See Story, Sect. 31, and *Panama and South Pacific Tel. Co. v. Indian Rubber, etc. Works Co.* (1879), 10 Ch. 515; Wright's *Principal & Agent*, p. 15.

8. *Solomons v. Pender* (1865), 3H. & C. 639.

9. *Dunne v. English*, (1874) L.R. 18 Eq. 524.

administration, who wanted the estate divided equally among the creditors.¹

One agent
for both
parties.

There is, however, no objection to a person acting as agent for two parties to a contract where their interests are not in conflict, or where no discretion is given to him, or in other words, the agent of one party to a contract is not incompetent to act as the agent of the other party thereto, where he can do so consistently with his duty to his principal. Thus, a broker frequently acts for both the buyer and the seller of goods, and an insurance broker may, though he does not necessarily, act as agent for the underwriters as well as the assured.² In England, the signature of a broker employed by both buyer and seller, or of an auctioneer, to a contract of sale, operates as the signature of both parties within the meaning of the sale of Goods Act, 1893, S. 4., or of the Law of Property Act, 1925, S. 40.³ And it has been held that a clerk or factor of one of the parties to a contract is competent to act as the agent of the other party for the same purpose.⁴ When the agent's duties to either or both the parties are merely ministerial (as where an auctioneer sells for the seller and signs the memorandum of sale for the purchaser), there the agent may act for both parties.⁵

Miscellaneous

A Government does not act as the agents of any of its subjects in making a treaty, or in receiving reparations or other payments thereunder.⁶

Sometimes questions of fact arise as to whose agent a person was. In *Gibbons v. Proctor* 7, on 29th May the defendant instructed his printers to print handbills offering a reward of 25 £. to the person who should give information to P., a superintendent of police, leading to the conviction of the perpetrator of a certain crime. The plaintiff, a police officer, on the same morning before the instructions to print the handbills had been given by the defendant, had communicated the desired information to a fellow police officer named C with instructions to forward it to P, and C thereupon communicated the information, in accordance with the rules of the force, to his own immediate superior officer L, who sent it on the same evening to P, whom it reached in due course on the following morning, the 30th May, after the time when the said handbills had been delivered to and had been distributed by him to the neighbouring police-stations. It was held that the plaintiff, the importance of whose information was admitted, was entitled to the reward, the

1 *In re Burt, Burt v Burt* (1883), 22 C. D. 604; *Wickens v. Townsend* (1830), 1 Rus. & Mylne, 361, : solicitor not allowed to acquire lcn. See Wright's *Principal & Agent*, pp. 15, 16.

2 *Shee v. Clarkson* (1810), 12 East 507= 11 R. R 473; *Empress Ass. Corp'n v. Bowering* (1906), 11 Com. cas. 107; *Glasgow Ass. Corp'n v. Symondson* (1911), 104 L. T. 254.

3 Bowstead, p. 6 and authorities cited therein.

4 *Daniel v. Evans* (1862), 31 L. J. Ex. 337; 1 H. & C. 174. Ex. Ch; *Bird v. Boulter*, (1833), 4 B. & Ad. 443.

5 See Wright's *Principal & Agent*, p. 15.

6 Bowstead, p. 7, citing *Rustonjee v. R.* (1876) 2 Q. B. D. 69; *Credhan War Claimants' Association v. R.* (1932) A C 14=101 L. J. K. B. 105; *German Property Administrator v. Knoop*, (1933) 1 Ch 439=102 L. J. Ch 156.

7 64 L. T. 595=55 J. P. 616.

messengers, C and L, through whom such information was conveyed to P, being the plaintiff's agents to convey, and not P's agent to receive, the said message.

The plaintiff mortgaged her life interest in a fund to the defendants; it being part of the agreement that a policy should be effected on her life, and the premiums be secured on the mortgaged property. In an action for redemption the chief clerk found that 173 l. 19s. 1d. "premiums paid on policies," was due from the plaintiff to the defendants. L, a solicitor and agent to all the parties, paid the premiums to the insurance offices, receiving from them 5 per cent. commission. On summons to vary the chief clerk's certificate by the amount of the commission, on the ground that the "premiums paid on policies" only amounted to 165 l. 5s., it was held that after the premiums had been paid to the insurance offices, the mortgagor had no interest in them. The insurance offices received the premiums, and paid the commission out of them to their own agent.¹

There is no agency as between wrongdoers; each of them is personally liable.²

There are some few exceptions to the general rule that anyone may be an agent. In the case of certain classes of agents the law requires a qualification before they can act. For instance, though one may have the right to prosecute or defend his own cause in a court "either in person or by an attorney or agent of his choice"³ if he chooses to appear by agent that agent must be an attorney at law. In England, solicitors must be duly qualified, and an unqualified person acting as a solicitor is subject to penalties. Solicitors must also take out an annual practising certificate.⁴ A principal, who is successful in a suit, cannot recover costs from the other party if the solicitor employed by him is uncertified, nor can the solicitor in such a case recover his costs from his client.⁵

Agencies which require special qualification.

Similarly, under the same law, it has been held that a stockbroker if he is not licensed cannot recover his commission for acting relating to the sale or purchase of shares, though he is entitled to be paid what he has paid in respect of them.⁶ A county court bailiff must be authorised in writing by the judge to act as broker on an execution, and can then act without any other licence, and a bailiff to levy a distress must also be certificated by a county court judge.⁷ An infant cannot be an attorney to prosecute a suit;⁸ nor can a married woman, probably since it has been considered that she is only capable of being sued in matters relating to herself personally.⁹

¹ *Leste v. Wallace*, 58 L. T. 577.

² *Hugh v. Abercromby (Earl)*, 23 W. R. 40.

³ *Mechem*, S. 181; See the Legal Practitioners Act, 1879.

⁴ *Solicitors Acts*, 1843 (6 & 7 Vict. C. 73), and 1860 (23 & 24 Vict., C. 127); See the Legal Practitioners Act, 1879, ss. 10, 20 and 32.

⁵ See *Halsbury*, [2nd Edn.] Vol. I, Art. 353, p. 199 & the authorities cited therein.

⁶ *Smith v. Lindo*, [1858], 5 C. B. N. S. 587; *Pidgeon v. Burslem* [1849], 18 L. J. Ex. 193.

⁷ *Halsbury*, [2nd Edn.] Vol. I, Art. 353, p. 199.

⁸ *Heave v. Greenbank*, [1749], 3 Atk. 695, at p. 710.

⁹ *Thompson v. St. Maur* [1887], 34 Ch. D. 465.

Mere want of skill or education is no disqualification for a man to serve as agent except in those cases where the law allows only the experts to work as agents. In *Foreman v. G. W. Ry. Co.*,¹ an agent who was unable to read, was authorised to enter into and sign a contract on his principal's behalf. It was held that the principal could not avoid a written contract made by the agent on the ground of his inability to read it.

A man may also have made himself incapable of acting as agent for a certain person by his position with respect to the subject matter, as, for instance, a man cannot sign a contract as agent for one party if he himself is the other party;² for one of the parties cannot be agent of the other for the purpose of signing the contract, though, as already noted, the same person may act as agent of both parties, as, for instance, an auctioneer.

A firm may be employed to transact business on behalf of another person.³

26. Consideration for agency not necessary.

No consideration is necessary to create an agency.

(S. 185, *Indian contract Act, 1872*.)

By the Common Law no consideration is required to give a man the authority of an agent, nor to make him liable to the principal for negligence in that which he has already set about, for such liability, though it may be defined by the terms of a contract, is in its nature independent of contract; but a merely gratuitous employment or authority does not bind the agent to do anything; and if, having neither reward nor promise of reward, he does nothing at all, the principal does not appear to have any remedy. But this distinction is of little practical importance, if any.⁴

Under the provisions of section 185 of the Indian Contract Act also no consideration is necessary to create an agency.⁵ Where a person agrees to be an agent the contract of agency is created and the relation of principal and agent is constituted between the parties. It is not material whether the offer on the part of the agent is simply gratuitous and without any consideration.⁶ We shall revert to this subject when we come to deal with the remuneration of agents.

27. How the relation of agency may be constituted.

The relation of agency being a contractual relation, it exists, and can only exist, by virtue of the express or implied assent of both principal and agent,⁷ except in certain cases of

1. 38 L. L. 851.

2. *Wright v. Dunlop* (1813), 3 Camp. 203; *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720; see Halsbury, (2nd Edn.), Vol. I, Art. 353, p. 199.

3. See *Murugappa v. Off. Assignee, Madras*, 42 C. W. N. 8, P. C.

4. Pollock & Mulla, p. 533.

5. See *Allahabad Bank v. Simla Banking*, 1929 Lah 182= 114 I. C. 321.

6. *Bhoobun Chandra v. Ram Sundar*, I. L. R. 3 Cal 300.

7. Bowstead, p. 13 citing *Pole v. Leask* (1862) 33 L. J. Ch. 155; *Markwick v. Hardingham* (1880) 15 C. L. D. 339 349 C. A.; *Lore v. Muck*, (1905), 93 L. T. 352, C. A.

necessity in which the relation is imposed by operation of law. ¹

The assent of the principal is implied whenever another person occupies such a position that, according to the ordinary usages of mankind, he would be understood to have the principal's authority to act on his behalf. ²

The assent of the agent is implied whenever he acts or assumes to act on behalf of another person and after having so acted or assumed to act he is not permitted, in an action by such person, to deny that the agency in fact existed, or that he acted on such person's behalf. ³

The relationship of principal and agent may be constituted:—

- (a) by express appointment by the principal, or by a person duly authorised by the principal to make such appointment;
- (b) by implication of law from the conduct or situation of the parties, or from the necessity of the case; or
- (c) by subsequent ratification by the principal of acts done on his behalf. ⁴

Where a person assumes to act on behalf of another, the assent of the person on whose behalf the act is done will not be implied from his mere silence or acquiescence, unless the situation of the parties is such as to raise a presumption that the act is done by his authority. ⁵

There is no particular form of agreement or document necessary to create an agency. In fact, in actual mercantile practice, many agencies are created orally or through implication, such as where a person orders his broker to buy goods for him or to secure for him a particular form of insurance policy, there is an agency created by an oral arrangement, the details of which are implied by the custom and practice attaching to such transactions. It is usual, however, where important officers and servants are given authority to act on behalf of their masters or principals in order to bind them in connection with various transactions, to give them a power of attorney in the form of a written document authorizing them to act in such capacity.

No particular form of agreement necessary

The consent of both principal and agent is required to constitute an agency. Lord Cranworth stated the law as follows:—"No one can become the agent of another except by the will of that other person. His will may be manifested in writing, or orally, or simply by placing another in a situation in which according to the ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and act for the person who has so placed him; but in every case it is only

Consent of both principal and agent required to constitute an agency.

See *G. N. Kay v. Szeffold* (174), 43 L. J. Ex. 69 *San Medland Ry.* (1913) 1 K. B. 103; *Springer v. G. W. Ry.* (1921) 1 K. B. 257, per Esher M. R. in *Guthrie v. Tait*, 20 B. 54.

Bowstead, p. 13, citing *Pole v. Leach*, (1862), 33 L. J. Ch. 135.

Bowstead, p. 13, citing *Roberts v. Ogilby* [1821], 9 Price 269 *Moore v. Peacock* [1891], 7 T. L. R. 748.

Bowstead, p. 13.

Bowstead, pp. 13, 14.

by the will of the employer that an agency can be created." ¹ The agent on his side must have also consented to be agent, or have represented either actually or by conduct that he was acting for the principal, against whom it is sought to establish an agency by estoppel, ² for "the relation of principal and agent requires the consensus, of both parties".³

Agency by
express appo-
intment by
the principal

Express appointment of an agent by the principal may be made by deed duly drawn up and executed and registered or as it is known in English law by a deed under seal. It may also be made in writing only or even verbally. No particular form is necessary.⁴

Appointment
to be in writ-
ing when so
required by
the statute
under which
the agent to
act.

Where an agent is to act under the provisions of some statute and such statute requires that the appointment of the person so authorized to act must be made in some special form, that form should be strictly adhered to in order to entitle such person to act under it.⁵ For instance, the Code of Civil Procedure requires that no pleader shall act for any person in any court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorised by or under a power-of-attorney to make such appointment.⁶ An appointment of a solicitor or vakil or pleader made otherwise than in the way prescribed in the law of procedure is invalid and acts done under it are without authority and not binding on the client. The courts are not bound to take notice of such agency and must refuse such solicitor, vakil or pleader the appearance on behalf of his client. In England, even a solicitor may be appointed by word of mouth to institute an action or suit but as the burden of distinctly proving that he was so authorized lies in all cases upon him, it is, therefore, for his own protection that he should require a written retainer.⁷ So also, when any person applies to any officer of Customs for permission to transact any specified business with him on behalf of any other person, such officer may require the applicant to produce a written authority from the person on whose behalf such business is to be transacted, and in default of the production of such authority may refuse such permission.⁸ So also, the Indian Companies Act, 1913, provides that in so far as the articles of the company do not make other provision in that behalf, on a poll votes may be given either personally or by proxy, and that the instrument appointing a proxy shall be in writing under the hand of the appointor or of his attorney duly authorized in writing, or if the appointor is a corporation, either under seal or under the hand of an officer, or an attorney duly authorized.⁹

1. *Pole v Leask*, [1863], 33 L J Ch 155, at p 161.

2. *Wilson v. Tummam* (1846), 6 M. & G 236. Story on Agency, Sec. 251 a; *Watson v. Strann*, [1862], 11 C B N S. 756

3. *Markwick v Hardingham* [1880], 15 C D 339, per Lord Justice James, p 349.

4. Bowstead, p 37, Mechem, 8 221.

5. Bowstead, p. 37.

6. O. III, R. 4 [1]

7. See Bowstead p 38 and the authorities cited therein.

8. S. 203, the Sea Customs Act 1878 (Act VIII of 1878)

9. Clauses (c) & (f) S. 79 (2), Indian Companies Act, 1913

Again, under the English law, where an agent is authorised to execute a deed on behalf of his principal, his authority must be given by an instrument under seal.¹ In India, every document to be registered under the Indian Registration Act, 1908, whether such registration be compulsory or optional, must be presented for registration either by the executant himself or his representative or assignee, or by the agent of such executant, representative or assignee, duly authorized by a power of attorney executed and authenticated in the manner provided for in section 33 of that Act.² Such power of attorney, if the principal resides in any part of British India where the Indian Registration Act, 1908, is in force, must be executed and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides; or if the principal resides in any other part of British India, it must be executed before and authenticated by any Magistrate; or if the principal does not reside in British India it must be executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of His Majesty or of the Central Government. Persons who by reason of bodily infirmity are unable to attend without risk of serious inconvenience, who are in jail under civil or criminal process, and who are exempt by law from personal appearance in court, are exempted from personal appearance before the Registrar, Sub-Registrar or Magistrate for this purpose and in this case the Registrar, Sub-Registrar or Magistrate as the case may be, if satisfied that the power-of-attorney has been voluntarily executed by the person purporting to be the principal, may attest the same without requiring personal attendance of the principal.³ These provisions of the Indian Registration Act have been held to be imperative. Consequently, where a registered document purports to have been presented for registration by an agent not holding a power of attorney executed and authenticated as above, the defect is not only a defect of procedure but one that invalidates the registration and makes the deed ineffective.⁴

Authority to execute a deed must be conferred by a deed

Authority to fill up blanks—According to English law an authority to fill up blanks in a deed or bond must as well be conferred by an instrument under seal.⁵ But in America the rule has been regarded by the modern authorities too technical to be given effect to.⁶

Exceptions.

The rule does not extend to cases where seal or registration is superfluous.⁷ So all the deeds which do not require to be under seal or are not compulsorily registrable

¹ Bowstead p. 38, citing *Berkeley v. Hardy*, (1826), 5 B. & C. 355

² S. 32 Indian Registration Act, 1908

³ S. 33, Indian Registration Act, 1908

⁴ See *Jambu Prasad v. Mohd Aftab Ali Khan*, 37 All 49 (P. C.); *Ishri Prasad v. Basinath*, 28 All. 707; *Majilunnisa v. Abdur Rahim* 23 All. 233 (P. C.).
Ma Shree Mya v. Maung Ho Hnauung, 1922 P. C. 359.

⁵ *Hbbheukite v. Mc Morne*, 6 M. & W. 200. See the Indian Evidence Act, ss. 91 & 92.

⁶ See *Mechem*, §. 213; *Katias*, pp. 59, 60.

⁷ See *Mechem*, §. 215.

under the Indian Registration Act, 1908, are not vitiated by this defect. They may be validly executed and presented for registration by an agent not holding a power of attorney executed and authenticated as above. The view that authority to execute a document relating to or contract required by law to be in writing though not under seal must be conferred in writing, is no longer tenable, and the cases which support that view, are not considered good law.¹

Again, the rule does not apply where the deed is executed in the name and presence of the principal and the authority to execute it is given by him there and then, in which case it may be given by word of mouth or by signs.² The principle underlying it is that when person about to perform a certain act himself determines on all of the elements of it which essentially belong to it, he may avail himself of any mechanical or ministerial agency which may be convenient in giving physical form or manifestation to the act. Human instrumentalities may be employed for this purpose as well as inanimate ones.³ "If I wish to sign my name to a document", says Mr. Mechem, "I may use a pen, a typewriter, a rubber stamp, or the hand of a third person indifferently, inasmuch as in such a case I furnish the consciousness, the volition, the will and cause the act to be done under my immediate direction and control; it is my act whether I employ an inanimate tool to make the visible mark or an animate one. Such a tool so used is not an agent and the rules governing the appointment of an agent do not apply to its use. Hence the rule, of quite wide application is that acts of merely mechanical or ministerial nature, done by one person in the presence and by the directions and assent of another and in a part of some larger act which the latter is then engaged in performing, are as valid as if done by the latter in person."⁴

Accordingly, it has been held that where the executant of a document is himself present at the registration office and admits its execution, the mechanical act of presentation by any other person with his permission does not invalidate the document.⁵

Thus, under the English law, it has been held that a partner cannot bind his firm or the other partners by deed, unless expressly authorised under seal to do so,⁶ except where the deed is executed by the authority and in the presence of all the partners.⁷

An agent may be appointed by word of mouth, even where he is authorised to enter into a contract required by statute to be in writing,⁸ unless the statute required appointment in

Appointment not necessary in writing even though the contract to be entered into by agent to be in writing

1. See Mechem, §. 236; Bowstead, p. 37.

2. Bowstead, p. 38., Mechem, §. 216; See *R v. Longnor*, (1833). 4 B & Ad. 647.

3. See also Mechem, §. 208 and the authorities cited therein.

4. Mechem, pp. 152 & 153.

5. See *Atma Ram v. Ugra Sam*, 35 All. 134; *Krita Krishna v. Hanman*, 35 All. 72, *Nothunul v. Abdul Wahid Khan*, 34 All. 355, *Shridhar v. Janardan*, 1923 Bom. 37.

6. *Harrison v. Jackson*, (1797), 7 T. R. 207.

7. *Ball v. Dunster Alley*, (1791), 4 T. R. 313, *Burn v. Burn*, (1798), 3 Ves. 578.

8. Bowstead, p. 37 and the authorities cited therein.

writing.¹ Letters written by an agent within the scope of his authority, and signed by him, are a sufficient memorandum if they contain the terms of an agreement entered into by his principal, or refer to other documents containing such terms, although the agent was not specifically authorised to sign a memorandum for the purpose of binding his principal.² So authority to subscribe the name of the principal to the memorandum of association of a joint stock company, or to the instrument of dissolution of a building society, may be given verbally.³

In England, a contract for the purchase of land made by an agent, as such, vests the equitable estate in the principal, and the contract may be enforced by the principal as against both the vendor and the agent and if the agent were appointed orally, provided that the legal estate has not been conveyed to him.⁴ If the land has been conveyed to the agent, so as to vest the legal estate in him, he is a trustee for the principal, and is not entitled to take advantage of the Law of Property Act, 1925,⁵ S. 53, which provides that a declaration of trust respecting any land or any interest therein must be manifested and proved by writing.⁶

At common law the contracts of corporations must in general be under seal. To this, however, there are some exceptions. One of them is where the whole consideration has been executed and the corporation has accepted the executed consideration, in which case the corporation is liable on an implied contract to pay for the work done, provided that the work was necessary for carrying out the purposes for which the corporation exists.⁷ The exception is based on the injustice of allowing a corporation to take the benefit of work without paying for it.⁸ This exception, however, is in certain cases excluded by statute. Contracts with a corporation are often required by the Act creating it to be executed in a particular form, as, for instance, under seal. The question in such cases is whether the Act is imperative and not subject to any implied exception when the consideration has been executed in favour of the corporation. If the Act is imperative and the contract is not under seal the fact that the consideration has been executed on either side does not entitle the party who has performed his part to sue the other on an implied contract for compensation. This may work hardship, but the provision

Appointment
by corporations

¹ Bowstead, p. 37.

² *Griffiths Cycle Corpn. v. Humber*, (1899) 2 Q. B. 414; *Daniels v. Trefusis* (1914) 1 Ch. 788. An entry in the minute Book of a company, signed by the Chairman is a sufficient memorandum; *Jones v. Victoria Graving Dock Co.*, (1877), 2 Q. B. D. 314.

³ *Re Whitley, ex. p. Callon* (1886), 32 Ch. D. 337; *Dennison v. Jeffs*, (1896) 1 Ch. 611.

Heard v. Pilley (1869), L. R. 4 Ch. 548; *Cave v. Mackenzie* (1877), 46 L. J. Ch. 564.

⁵ 15 Geo. 5, C. 20.

⁶ *Rochevoucauld v. Bowstead*, (1897) 1 Ch. 196—66 L. J. Ch. 74.

⁷ *Lawford v. Billericay Rural District Council*, (1908) 1 K. B. 772.

⁸ *Clarke v. Cuckfield Union* (1852) 31 L. J. Q. B. 349, 351—91 R. B. 891.

of the Act being imperative, and not merely directory, it must be complied with.¹

The rule regarding appointment of agents by corporations in England has been thus stated by Bowstead:²

"The appointment of an agent by a corporation must be under its common seal. Provided, that this rule does not apply to trading corporations, joint stock companies, or industrial and provident societies, nor where its application would cause very great inconvenience, or tend to defeat the purposes for which the corporation was created, nor where work incidental to such purposes has been done by the agent at the request of the corporation and the corporation has accepted the benefit of such work."

Exceptions.

It is now settled in England that corporations may bind themselves by parol, whenever the acts in question are so frequently recurring, or so insignificant, or of such immediate urgency, that the affixing of the seal would be a great inconvenience, or where the corporation has ordered and accepted work or goods necessary for the purposes for which the corporation was established; and that trading corporations are bound by their parol contracts, without reference to their frequency, or to the magnitude of the subject-matter thereof, whenever the contracts are within the scope of the objects of incorporation. A company registered under the Companies Act, 1929,³ or governed by the Companies Act, 1845,⁴ or an industrial and provident society,⁵ may appoint an agent by parol for any purpose which is *intra vires*, except the execution of a deed.⁶

It must, however, be remembered, as already stated, that these exceptions will have no application to the contracts of any body corporate constituted by particular statute, where the statute itself prescribes that a contract may be carried out without seal, or where it expressly prescribes that a contract shall be in writing sealed with the common seal of the company.⁷ The greater portion of corporated bodies in India have been incorporated under the Indian Companies Act, 1913. Under S. 88 of this Act Companies are placed on the same footing as private persons with regard to the form of their contracts; and contracts under their common seal, or made in writing, or by parol through their agents have the same validity as contracts in a similar form between private persons.⁸ Other corporated bodies have been incorporated under special Acts. In all cases the relevant law applicable must be looked into as to the form of contract, and in the absence of any thing to the contrary, the general principles of English law will prevail.

1. See Pollock & Mulla, pp. 350, 351.

2. Page 39 and the authorities cited therein.

3. 19 & 20 Geo. 5, C. 23, S. 29.

4. 8 & 9 Vict. C. 39, S. 35.

5. 56 & 57 Vict. C. 39, S. 35.

6. Bowstead, p. 40 citing *South of Ireland Colliery Co. v Waddle* (1869), L. R. 4 C. P. 617; *Henderson v. Australian Steam Navigation Co.* (1855), 24 L. J. Q. B. 322. See also *R. v. Cumberland*, (1848) 5 D. & L. 431.

7. See also *Hunt v. Wimbledon Local Board*, L. R. 3 C. P. 268=L. R. 4 C. P. 4.

8. See also S. 90 of the Indian Companies Act, 1913, regarding execution of deeds.

Where a corporation holds out or permits a person to appear as its agent, it is bound by his acts as such with respect to persons dealing with him in good faith and without notice of any informality, though he has not been formally appointed.¹ Thus, where an attorney, who had not been appointed under seal, appeared in an action for a corporation to the knowledge of the directors, it was held that the corporation was bound by his acts as its attorney.² So, a company may be bound by the acts of persons acting as directors of the company, though such persons have not been duly appointed directors.³

An agency is constituted by implication of law where any one has so acted as from his conduct to lead another to believe that he has appointed a particular person as his agent, and knows that other person is about to act in that behalf; then he will be estopped from disputing the agency, though in fact no agency really existed⁴ or the ostensible agent merely acted in excess of his actual authority. When any person, by words or conduct, represents or permits it to be represented that another person is his agent, he will not be permitted to deny the agency with respect to any third person, dealing on the faith of any such representation, with the person so held out as an agent, even if no agency exists in fact. Similarly, when a person by words or conduct represents or permits it to be represented that he is an agent of another person, he will not be permitted to deny agency with respect to any third person dealing with him on the faith of any such representation even if no agency exists in fact.⁵

(b) Agency by implication or estoppel.

As will be seen from the above statement of the law, the agency constituted by implication of law rests on the principle of estoppel solely. In such a case the principle cannot set up a private limitation upon the agent's ostensible authority,⁶ for, so far as third persons are concerned, the ostensible authority is the sole test of his liability.⁷ But if the agent be held out as having only a limited authority to do on behalf of his principal acts of a particular class, the principal is not bound by an act outside that authority even though it be an act of that particular class.⁸ But the *onus* lies upon the person dealing with the agent to prove either real or ostensible authority,⁹ and it is a matter of fact in each case whether ostensible authority existed for the particular act for which it is sought to make the principal liable.¹⁰ Holding out is something more than

1 Bowstead, p. 40.

2 *Fariell v. Eastern Counties Ry.* (1848, 2 Ex. 344.

3 *Mahoney v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, H. L. •

4 *Per Lord Cranworth, Pole v. Leask.* (1863), 33 L. J. Ch. 155, at p. 162.

5 See Halsbury, Vol. I (2nd Edn.), p. 209; Bowstead, pp 13, 18; Mechem, ss. 241-247.

6 *Haicken v. Bourne* (1841), 8 M. & W. 703; *Maddick v. Marshall* (1864), 17 C. B. (N. S.) 829; *Riley v. Puckington* (1867), L. R. 2 C. P. 536; Halsbury, (2nd Edn.), Vol. I, p. 209.

7 *Pickering v. Busk* (1812), 15 East, 38. Halsbury, (2nd Edn.) Vol. I, p. 209.

8 Halsbury, Vol. I (2nd Edn.), p. 209 and authorities cited therein.

9 *Ibid.*

10 *Ibid.*

estoppel by negligence; it is necessary to prove affirmatively conduct amounting to holding out.¹

The following instances of creation of agency by implication or estoppel may be noted :

1. By a trust deed securing debentures. the property of a company was transferred to trustees upon trust to permit the company to carry on the business until the happening of certain specified events, on the happening of which the trustees were empowered to appoint a receiver, and it was provided that any receiver so appointed should be the agent of the company. who alone should be liable for his acts and defaults. It was held that a receiver so appointed, who entered into possession and carried on the business of the company, was not an agent of the trustees, and that they were not liable for the price of goods supplied for the purpose of the business.² But where power was given by debentures to the holders to appoint a receiver to take possession of the property charged and carry on the business of the company, and to sell the property charged and make any arrangements or compromise in the interests of the debenture holders, and it was not provided that the receiver should be an agent of the company, it was held that a receiver appointed in pursuance of the power was an agent of the debenture holders and not of the company.³ So, a receiver and manager of the business of a company appointed by the Court at the instance of debenture holders is not an agent of the company.⁴

2. A debtor, being embarrassed, executes a deed whereby A and B are appointed inspectors, with power to control him in carrying on the business, and to receive moneys and pay current expenses, etc., but not to take the management of the business out of his hands. The debtor is not an agent of A and B to carry on the business, but a principal carrying on his own business subject to their inspection and control.⁵

3. A debtor, by deed, assigns his business and effects to A and B as trustees to continue the business in his name, for the benefit of his creditors, and, in accordance with the provisions of the deed, the debtor is employed by A and B to carry on the business. The debtor is an agent of A and B for the purpose of carrying on the business and they are liable on contracts made by him in the ordinary course thereof in his own name.⁶ The debtor is not, nor are A and B, an agent or agents of the creditors in carrying on the business.⁷

1. Halsbury, Vol. I. (2nd Edn.), p. 209 and authorities cited therein.

2. *Gosting v. Gaskell*, (1897) A. C. 575=66 L. J. Q. B. 848, H. L.

3. *Vimbois*, (1900) 1 Ch. 470; *Deyes v. Wood*, (1911) 1 K. B. 806.

4. *Burt v. Bull*, (1895) 1 Q. B. 276. And see *Boehm v. Goodall*, (1910) 27 T. L. R. 106. A person authorised under the Lunacy Act, 1890 (53 & 54 Vict. C. 5), ss. 116 and 120, to carry on the business of a lunatic not so found, is in the position of an agent of the lunatic for that purpose; *Plumpton v. Burkinshaw* (1908) 2 K. B. 572.

5. *Redpath v. Wigg*, (1866) 35 L. J. Ex. 311; *Eusterbrook v. Banker*, 1(170). 40 L. J. C. P. 17; *Hobson v. Jones*, (1870), 39 L. J. Ch. 245; *Marconi's Wireless Telegraph Co. v. Newman*, (1930) 2 K. B. 292.

6. *Furze v. Sherwood* (1841), 2 Q. B. 388. Comp. *Nicholls v. Knapman* (1910) 102 L. T. 306, C. A.

7. *Cox v. Hickman* (1861), 30 L. J. C. P. 125.

4. A buys property at a sale by auction. The auctioneer is an implied agent of A for the purpose of signing the contract of sale on his behalf, so as to satisfy the requirements of the Law of Property Act, 1925, S. 4, or of the Sale of Goods Act, 1933, S. 4,¹ *it being understood that the auctioneer has authority, in the ordinary course of business, to sign the contract on behalf of the highest bidder.*² Subsequently to the sale, B buys certain unsold lots by private contract with the auctioneer. The auctioneer has no implied authority to sign the contract on B's behalf.³ The implied authority to sign for the highest bidder can only be exercised at the time of the sale, *i. e.*, while the bidder is in the auction room, or so long afterwards as the signature can reasonably be held to form part of the contract.⁴

5. A buys property at a sale by auction, and at the request of the auctioneer's clerk, who is acting under the directions of the auctioneer, gives his name and address in a memorandum of the sale. The memorandum is signed by a duly authorised agent of A within the meaning of the Law of Property Act, 1925, the conduct of A being such as to show that he assented to the clerk's signing his name on his behalf.⁵ The implied authority of the auctioneer to sign on behalf of a purchaser does not, however, extend to the auctioneer's clerk, and a purchaser is not bound by the signature of the clerk, unless he indicates, by word or sign, that he assents to the clerk's signing for him.⁶

6. A bought goods at a sale by auction, the vendor having previously agreed with him that the price of any goods he might buy should be set off against a debt. Held, that the auctioneer though not aware of the previous agreement with the vendor, had no authority to sign on A's behalf a contract subject to a condition providing for payment in cash.⁷

7. A is a mortgagor in possession. He is an implied agent of the mortgagee to distrain for rent due under a lease granted prior to the mortgage.⁸ But a pledgee of an insurance policy has no implied authority, as such, to give, on behalf of the pledgor, a notice of abandonment to the underwriters.⁹

1. 56 and 57 Vict. c. 71, S. 4 (1) of the Act reads as follows:

"A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

2. *Emmerson v. Heelis*, 2 Tannt. 38; *White v. Proctor* (1811), 4 Tannt 209. But the auctioneer has no authority to sign a contract bearing a wrong date: *Van Praugh v. Everidge*, (1903) 1 Ch. 434.

3. *Mears v. Carr* (1856), 1 H. & N. 484.

4. *Bell v. Balls* (1897) 1 Ch. 663; *Chaney v. Macdon* (1929) 1 Ch. 461. An authority to sign separate contracts for several lots is not an authority to sign one contract for all the lots: *Smith v. Mac Gowan*, (1938) 3 A. E. R. 447.

5. *Sims v. Laudray*, (1894) 2 Ch. 318; *Bird v. Boulter* (1833) 1 N & M 313=38 B. R. 285.

6. *Bell v. Balls*, (1897) 1 Ch. 673;

7. *Bartlett v. Purnell* (1836), 5 L. J. K. B. 169=43 B. R. 484.

8. *Trent v. Hunt* (1853) 9 Ex. 14; *Snell v. Finch* (1863) 32 L. J. C. P. 117.

9. *Jardine v. Leathley* (1863), 32 L. J. Q. B. 132.

8. Property is sold under a decree. The solicitor having the management of the sale is, in the conduct thereof, deemed to be the agent of all the parties to the suit, as between them and the purchaser.¹

9. A was employed by B & Co. as their broker who sold goods, the property of his principals lying in the London Docks to C and drew a bill of exchange in his own name which was accepted by C and paid. A then became bankrupt and B & Co. discovering his position called upon C for payment. C refused to pay alleging a valid payment to A and bought trover for his goods against B & Co. It was found that B & Co. had allowed A on some other previous occasions, to draw bills in his own name without mention of them as his principals. It was held by the court on this finding that B. & Co. were bound by the payment and the action will lay against them.²

Agency by
estoppel:
holding out.

10. At a meeting of the provisional directors of a proposed company it was resolved that the company should be advertised and the secretary was directed to take the necessary steps for that purpose. The secretary employed an advertising agent and upon being asked on what authority he was acting, showed the agent, the prospectus and resolution. *Held*, that the jury were justified in finding the directors who were parties to the resolution liable for the expenses of the advertising agent, on the ground that they had held out the secretary as having authority to pledge their credit, therefore, though they had allowed their names to appear as provisional directors on the faith of a promise by the secretary to find all the preliminary expenses.³ Where a promoter of a company has taken an active part in the promotion it is a question of fact whether he thereby held himself out as having authorised his credit to be pledged for expenses connected therewith and if so, whether the expenses were incurred in the faith of such holding out.⁴ But the mere fact, that a person is a promoter is not of itself evidence of his having authorised, or held himself out as having authorised, his credit to be pledged.⁵

The promoters of a company are not as such, implied agents to pledge the credit, or receive money on behalf of each other, in connection with the promotion of the company. Nor are the officers of a proposed company, as such, implied agents of the promoters thereof.⁶

11. The owner of certain goods permits A, who in the ordinary course of his business is accustomed to sell that class of goods, to have possession of the goods or of the documents

1. *Dalby v. Pullen*, (1830), 1 Russ & M. 296=30 R. R. 123

2. *Tousend v. Inglis Holt*, N. P. 278.

3. *Maddick v. Marshall*, [1864], 17 C. B. [N. S.] 829. Ex. Ch; *Riley v. Packington* [1867] L. R. 2 C P. 536.

4. *Lake v. Argyll* [1844] 6. Q. B. 477; *Wood v. Argyll* [1844] 13 L. J. C. P. 96; *Bailey v. Macauley* [1849], 13 Q. B. 815; *Williams v. Pigott*, [1848], 2 Ex. 201; *Bright v. Hutton* [1852], 3 H. L. C. 341; *Higgins v. Hopkins*, [1848] 3 Ex. 163.

5. *Norris v. Cottle* (1850) 2 H. L. C. 647; *Bright v. Hutton*, *supra*; *Hutton v. Thompson* [1851], 3 H. L. C. 161; *Burbidge v. Morris* [1865], 34 L. J. Ex. 131. *Wylde v. Hopkins* [1846], 15 M. & W. 517; *Barker v. Stead* [1847], 3 C. B. 946; *Bailey v. Macauley*, *supra*; *Williams v. Pigott*, *supra*.

6. *Burnside v. Dayrell* [1849], 3 Ex. 224=77 R. R. 612.

of title thereto. A sells the goods to a person who buys them in the belief that he has authority to sell. The owner is bound by the sale, independently of the Factors Acts, though he did not in fact authorise A to sell the goods.¹

A and B permitted their names to appear on a programme as stewards of a fete, C's name appearing thereon as general manager. A and B took an active part in the conduct of the fete. Held that they were liable on orders given by C for rents, etc.²

13. A had for some years managed a shop belonging to B and ordered goods in B's name for C, and B had duly paid for them. A absconded, called on C and bought goods in B's name, and took them away. Held, that B was liable for the price of the goods.³

14. A ship is chartered, and it is agreed by the charterparty that the master, who is appointed by the owners, shall sign bills of lading as the agent of the charterers only. The owners are liable on a bill of lading signed by the master, to a person who ships goods without notice of the charterparty.⁴ So, the owners are liable in such a case for necessities supplied on the master's orders by persons having no notice of the charterparty.⁵

15. A coachman in livery entered into a contract for the hire of horses, the person from whom he hired them giving credit to the master. The coachman had, in fact, agreed with the master to pay for the hire of the horses, but the person from whom they were hired had no notice of the agreement. Held, that the master was liable on the contract.⁶

16. A, a stockbroker, employed B, a clerk, to whom he allowed a commission on orders obtained by him and accepted by A. B was not authorised to accept orders on A's behalf. On three occasions C gave orders to B, which were passed on to A, and executed by him, A sending contract notes to C. C made payment in respect of the first two orders by cheques payable to A's order, and in respect of the third order by a cheque payable to B's order. The cheques were delivered to B, and passed on to A, who duly credited C. Subsequently, C gave orders to B who did not transmit them to A, but made out bought notes on which he forged A's signature, and handed them to C. C gave cheques in payment to B, who misapplied them. It was held that there was no evidence that A had held out B as authorised to accept orders on his behalf, and that A was under no liability in respect of the orders subsequent to the first three.⁷

1. *Pickering v. Busk* [1812], 15 East 38; *Dyer v. Pearson* [1824], 4 D. & R. 648; *Henderson v. Williams* [1895], 1 Q. B. 521.

2. *Pilot v. Craze*, [1888], 52 J. P. 311.

3. *Summers v. Solomon*, [1857], 26 L. J. Q. B. 301.

4. *Manchester Trust v. Furness* (1895) 2 Q. B. 509; *Sandeman v. Scurr* (1866) L. R. 2 Q. B. 86; *Baumicoll Manufactur v. Furness*, (1893) A. C. B.

5. *The Great Eastern* (1868), L. R. 2 Ad. 88; *Frost v. Oliver* (1853), 1 C. L. R. 1003.

6. *Rusell v. Sampayo* (1824), 1 C. & P. 254; *Precious v. Abel* (1795), 1 Esp. 350;

Maunder v. Congers (1817), 2 Stark 281; *Wright v. Glyn*, (1902) 1 K. B. 745.

7. *Spooner v. Broining*, (1898) 1 Q. B. 528.

17. A occasionally employed B to purchase goods from C, and duly recognised such purchases. Subsequently, B purchased goods from C for his own use, C believing him to be buying on behalf of A, and giving credit to A. Held, that it was a question of fact whether A had, by his conduct, held out B as his agent to purchase the goods, and that if he had done so, he was liable to C for the price.¹

18. A represented to a company that B was an applicant for a certain number of shares, and the company allotted them to B. Subsequently, B, at A's request, signed an application for the shares and sent it to A, who received the letter of allotment, and paid the allotment money. B never received any notice of the allotment, and the dividends on the shares were paid to A. Held, that B had held out A as his agent to accept the shares on his behalf, and was therefore liable as a contributory in the winding-up of the company.²

19. A signs an underwriting agreement purporting to give B authority to apply for shares in a company in A's name and on his behalf and hands it to an agent of the promoters, with a letter stating that the agreement was signed, and is only to hold good, on certain conditions. The agreement is delivered to B, who applies for the share and they are duly allotted to A, neither B nor the company having any notice of the letter or conditions. A is bound as a shareholder, though the conditions were not complied with.³

20. A was in B's counting-house, apparently entrusted with the conduct of B's business. Held, that a payment to A on B's account operated as a payment to B, although A was not, in fact, employed by B.⁴

21. A, in good faith, deals with persons acting as directors of a company, believing them to be duly authorised. The company is bound by their acts as directors, within the scope of the articles of association though they have not, in fact, even properly appointed.⁵

22. The directors of a company hold out to the world that A is the agent of the company for a particular purpose. The company is bound by A's acts, within the scope of such countenanced agency, done to the knowledge of the directors, though A is not a duly appointed agent of the company.⁶

23. A member of the managing committee of a club orders wine for the club, the committee having no authority to deal on credit. The other members of the committee are not liable for the price of the wine, unless they authorised the contract.⁷ The only persons liable for goods supplied to a member's club

1. *Todd v. Robinson* (1825), 1 Ry. & M. 217; *Gilman v. Robinson* (1825), 1 Ry. & M. 226; *Trueman v. Loder* [1840], 11 A. & E. 589; *Llewellyn v. Winckworth* [1845], 14 L. J. Ex. 329; *Prescott v. Flynn*, [1832], 1 L. J. C. P. 145; *Barrett v. Errine* [1907] 2 Ir. R. 462, C. A.
2. *Lerita's case* (1870), L. R. 5 Ch. 489.
3. *Ex. p. Harrison, Re Bentley* [1893], 69 L. T. 204, C. A.
4. *Barrett v. Deere* [1828], Moo & M. 200=31 R. R. 730.
5. *Mahony v. East Holyford Mining Co.* [1875] L. R. 7 H. L. 869; *Re County Life Ass. Co.* [1870] L. R. 5 Ch. 288=39 L. J. Ch. 471.
6. *Wilson v. West Hartlepool Harbour, etc. Co.* [1864], 34 Beav. 187.
7. *Todd v. Emly* [1841], 7 M. & W. 427=56 R. R. 748.

are those by whom, or by whose authority, the goods are ordered, and the mere fact that a person is a member of the managing committee is not of itself evidence of authority to pledge his credit.¹

24. A wife gave orders for furniture to be supplied and work to be done at the house where she resided with her husband, the husband being present giving directions as to the work, etc. Held, that the husband was liable on the orders, and it had been agreed between them that she should pay for the furniture and work, the plaintiff having had no notice of such prohibition or agreement.² So, where a wife ordered goods in her husband's name, to be sent to the house of a third person, and the husband paid for the goods, that was held to be sufficient evidence to justify a jury in finding that she had authority to pledge his credit on a subsequent occasion for goods to be sent to the same house.³

25. A, the tenant and licensee of a public house, agreed with B and the owners of a public house that B should become tenant in place of A, but the licence was not transferred to B and A's name remained painted over the doorway. C, not knowing that A was a licensee supplied goods at the public house to B, and afterwards discovered that A was the licensee and sued him for the price of the goods. Held, that the agreement that B should occupy a position as tenant which could only be lawfully occupied by A did not make B the agent of A in relation to C; and that there was no estoppel in the matter between A and C, because, whatever misrepresentation had been made, they had not reached C nor caused him to act to his detriment.⁴

26. Where a person has been acting as manager of a company for a long period and has been transacting all the business of the company as such manager, including the acceptance and endorsing of the bills of exchange of the value of several lacs of rupees, this fact alone is sufficient to establish that he had the proper authority of the partners to act as the manager of the company and so bind it as such.⁵

27. The goods in suit were ordered by one R an independent contractor, but it was the District Engineer who corresponded with the firm with respect to the order. The goods were despatched to the District Engineer and were apparently received by him or some body on his behalf. The goods were utilised for the construction of a building with which the District Board had no connection. It appeared that previously goods had been supplied to the District Board through the District Engineer. Held, that the District Engineer had not contracted on behalf of the District Board, that there was no

¹ *Oxerton v Hewett* [1887], 3 T. L. R. 246; *Steele v Gourley*, [1887], 3 T. L. R. 772, C. A.; *Wood v. Finch* [1861], 2 F. & F. 447; *Draper v. Manners* [1892], 9 T. L. R. 73. See also *Lascelles v. Rathbun* [1919], 35 T. L. R. 347 (Commanding Officer not liable for price of goods ordered by mess secretary).

² *Jettley v. Hill* [1884], 1 C. & E. 239.

³ *Fulmer v. Lynn* [1835], 4 N. & M. 559.

⁴ *Macfisheries Ltd. v. Harrison* [1924], 93 L. J. K. B. 811.

⁵ *Punjab Co-operative Bank, Ltd. v. Muhammad Yusuf*, A. I. R. 1939 Lah. 225.

holding out to H, and, a suit to realise the price of goods was not maintainable against the District Board.¹

28. The plaintiff took a contract from the Military Authorities for the supply of mutton. He deposited according to the rules a certain sum of money in one of the banks specified in the contract and obtained a receipt. Subsequently the Bank became insolvent and the plaintiff sued the military authorities represented by the Secretary of State for recovery of the amount over and above that rateably obtained by the Bank. *Held*, that the Bank was under these circumstances the agent of the defendants and that the latter was liable for the amount claimed in their capacity as principals.²

29. Agency need not be created expressly by any written document and can be inferred from the circumstances and the conduct of the parties. Where a person was employed to invest money on another's behalf and to represent the latter in dealings with debtors and the later conduct showed that the person employed entered into transactions on behalf of the employer, *held*, that the relationship between the parties was one of agency.³

30. The clerk in a bank in charge of savings bank accounts, through whom alone money could be withdrawn, and who alone could report to the official concerned what a particular depositor desirous of withdrawing money has to his credit money in excess of what he desires to withdraw, so far as he acts within the scope of his authority, is an agent of the bank.⁴

31. Circumstances may arise in which a person who enters into a contract of sale as agent, for example, as agent for an undisclosed principal, may be deemed to be either a principal or an agent *vis à vis* other party to the contract of sale, but in the eye of the law he cannot be regarded as filling at the same time both capacities. In effecting the contract of sale, he must needs have acted either as a principal, or as an agent. The agreement between a commission agent and the party for whom he is acting may, at the outset, be that between a principal and his agent, and so long as the contract remains executory the relationship of principal and agent may subsist between the parties. Such a broker may possess a right in certain circumstances to stop the goods in transit. But after the contract of purchase has been effected the relationship of the parties *quoad* the contract of sale ceases to be that of the principal and agent, and ripens into that of vendor and purchaser, though it may be necessary to refer to some other agreement; for example to ascertain the terms and conditions of the contract of sale, it may be different to ascertain whether in any particular case the relationship between the parties is that of principal and agent or of vendor and vendee, but inevitably it must be either the one or the other.⁵

1. *Jessop & Co., Ltd. v. District Board of Monghyr*, 1931 Cal. 423=58 Cal. 7=132 I. C. 907.

2. *Hari Singh v. Secretary of State for India in Council*, 1931 Lah. 849=133 I. C. 881.

3. *Khub Chand v. Chittarnal*, A. I. R. 1931 All. 372=132 I. C. 43.

4. *Benares Bank, Ltd. v. Ram Prasad*, 1930 All. 573=124 I. C. 180.

5. *MacLeod & Co. v. Tan Jones & Co.*, 1925 Cal. 189=87 I. C. 218.

32. As regards partners, the rule of English law is that everyone who, by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to anyone who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by, or with the knowledge of, the apparent partner making the representation or suffering it to be made. Provided that where after a partner's death the partnership business is continued in the old firm's name, the continued use of that name or of the deceased partner's name as part thereof does not of itself make his executors, or administrators, estate, or effects, liable for any partnership debts contracted after his death.¹

Neither the committee of management nor servants of a club are as such, deemed to be held out by the members of the club as having authority to pledge the personal credit of the members.²

The person relying on agency by estoppel must show that he was led into the belief of agency in good faith from the previous dealings or representations. When at the time of dealings with him he was unaware of such previous dealings or representations, this plea is not available to him.³ As estoppel is always a matter personal to the individual who asserts it, he must show that he was misled by the appearances relied upon⁴ and not only that he had reasonable cause to believe that the authority existed, and mere belief without cause or belief on the face of facts which should have put him on his guard is not enough.⁵ The elements necessary to establish putative or apparent agency *i. e.* agency by estoppel, are acts justifying belief in the agency and reliance thereon by the other consistently with ordinary care and prudence.⁶ Ostensible agency cannot be shown by facts of which the party attempting to establish it had no knowledge.⁷

(General.

The general rule applicable to all such cases is that whenever a person has held out another as his agent authorised to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in that capacity, or where his habits or course of dealings have been such as to

1. Bowstead, p. 18; See the Indian Partnership Act, 1932 and notes on pages 28 to 31 and under the heading "Implied authority of partners."

2. *Ibid.*, p. 19 citing *Fleming v. Hector*, [1836] 6. L. J. Ex. 43; *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139; *Cockerell v. Aucompte* [1857], 26 L. J. C. P. 194; *Luckombe v. Ashton* [1862], 2 F. & F. 705.

3. *Cash v. Taylor*, 8. L. J. Q. B. 262 [O. S.]; See also *Hogarth v. Wherley*, 32 L. T. 800; *Odell v. Cormack*, 19 Q. B. D. 223; *Leonard v. Matheurs*, 18 L. T. 83 [O. S.]; *Philpot v. Stock*, 2 F. & F. 180 where a single instance of previous dealing was held not sufficient to evidence general authority; *Barber v. Ginnell*, 3 Esp. 60; *Morris v. Bethell*, 21 L. T. 330; See also *Mechem*, 8. 724.

4. *Lewis v. Brown*, 39 Tex. Civ. App. 139; *First National Bank v. Farmers etc., Bank*, 56 Neb. 149; *Katiar*, p. 68.

5. *Winklemann v. Brickert*, 102 Wis. 50; *Ladd v. Grand Isle*, 67 Vt. 172.

6. *Dunaseck v. Kluck*, 113 Wis. 336; *Mc Dermott v. Jackson*, 97 Wis. 64 on App. 102 Wis. 419.

7. *Rodgers v. Pecknam*, 120 Cal. 238 [Am.]; *Harris v. San Diego, etc. Co.*, 87 Cal. 526 [Am.]; See *Katiar*, p. 68.

reasonably warrent the presumption that such other was his agent authorised to act in that capacity whether it be in a single transaction or on a series of transactions his authority to such other to act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorised to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority.¹ The rule also extends to actions on torts based upon acts done in reliance upon the holding out.²

Such authority is not dependent upon proof of a conscious intention to confer it. The intention of the parties, it is true, must control, but that intention is to be gathered from what was actually done or agreed by the parties, and not from what they may have privately meant or supposed they meant. Agency or not is a question of law to be determined by the relation of the parties as they in fact exist under their agreements or acts. If relations exist which will constitute an agency, it will be an agency whether the parties understood it to be so or not. Their private intention will not affect it.³ A landowner who signs a contract for the sale of land, without reading it, when brought to him by his agent for signature, is bound by powers therein conferred upon the purchaser.⁴

It is of the essence of an authority created by "holding out" that the other party to the contract by reason of such "holding out" should have been induced to enter into the contract.⁵

(c) Impli-
cation
from
situation.

Father and
son.

Except in the cases of necessity which will be dealt with hereafter, no authority results merely from the relationship and a relation like any other stranger requires appointment and authorization to constitute him an agent.⁶ A son has no authority as such to lend his father's property and there is no presumption that such authority has been given to a son. It may be shown that authority to lend tools and the like has been given to a son expressly, or such an authority may be inferred from the conduct of the father tending to show that he reposed such confidence and entrusted such discretion to the son, as by showing that on other occasions the son had lent the father's property of a similar kind and the father, upon the facts coming to his knowledge, approved what he had done, but without such proof the son stands in the same position as a stranger.⁷ So a minor son living at home is not presumed to be the father's agent in hiring a tutor during vacations.⁸ Where a son has paid out his father's money for an unauthorised purpose, *e. g.* for the purpose of pipes and tobacco, the father

1. See Mechem, § 246 and the authorities cited therein; Katia, p. 69.

2. *Hannon v. Siegel Cooper Co.*, 62 L. R. A. 129.

3. *Bradstreet Co. v. Gull*, 2 L. R. A. 405.

4. *Laska v. Lodge*, 112 Mich. 635.

5. *K. S. R. M. Chettiar Firm v. A. T. K. P. L. S. P. Chettiar Firm*, 1934 Rang. 61—151 L. C. 804.

6. See Mechem §§. 156, 157, 161, 167 and 169 and the authorities cited therein; Katia, p. 71.

7. *Johnson v. Stone*, 77 Am. Dec. 706.

8. *Pearcock v. Linton*, 22 R. I. 328.

on tendering back the article can recover the money and a tender and demand by his wife on his behalf is sufficient.¹ So also money entrusted to a minor son for specific purpose and applied by him without the father's consent for compounding a crime committed by him may be recovered by the father.² But the right of a child to use property devoted to the purposes of the family in the usual and ordinary way may be implied. So when the child invites another to participate in that use, as, for example, to drive the father's horses in company with the child upon an occasion when the child might properly use them the person so driving cannot be treated by the father as wrong doer.³ Where the parent's horse is ridden by the son with the parent's authority it would seem to be an inference of law, or an incident of such authority or loan, that the son might assent to anything respecting the horse which in common prudence would be necessary for his existence or preservation.⁴ Where it was shown that a son had for years been signing his father's name to his own notes to the knowledge of the father who took no steps to prevent it, and gave no notice that it was unauthorized, the son's authority to so bind the father was presumed.⁵ So where a son had been, in his father's knowledge, in the habit of attending his father's store and there selling goods, taking orders, receiving payment for the goods sold and ordering goods from wholesale houses, the authority of the son to bind the father by a purchase of goods was inferred although the son appropriated the goods so purchased to his own use.⁶ Also, where a son, acting for his father in procuring a mortgage, took upon himself with his father's consent the whole negotiation, examined title, attended to the execution of the papers, received the money from his father and delivered it to the mortgagor and in short did everything there was for an agent to do in the matter, and as much as any agent could have done in a similar negotiation, he was conclusively presumed to have been the agent of his father in the transaction.⁷

So also a parent as such, whether father or mother, is not *per se* an agent of this child to bind him or his estate, whether the child be infant or adult.⁸ When the child is an infant, the parent as such has no greater authority than as a natural guardian. When he is adult he may appoint his parent an agent as he can do in the case of any other person.⁹

All the rules stated above apply to the relation of husband and wife. Neither the husband nor the wife has, by virtue of the marriage alone, any implied power to act as an agent of

Husband
and wife.

¹ *Sequin v. Peterson*, 12 Am. Dec. 195.

² *Burnham v. Holt*, 14 N. H. 367.

³ *Bennett v. Gilette*, 74 Am. Dec. 774.

⁴ *White v. Edgman*, 1 Over [Tenn.] 19.

⁵ *Weaver v. Ogletree*, 39 Ga. 586; see also *Brown v. Delouch*, 28 Ga. 486.

⁶ *Charber v. Anderson*, 88 Ill. 167; *Elmer v. State*, 30 Tex. 524; see also *Watkins v. Vince*, 2 Stark, 368.

⁷ *Matteson v. Blackiner*, 46 Mich. 393; *Durfee v. Seale*, 139 Cal. 603 [Am.]; See also *Center v. Rush*, 35 Miss. 294.

⁸ *Mechem*, §. 157 and authorities cited therein.

⁹ *Ibid.*

the other. This power must be conferred expressly or by implication in the same way as in the case of stranger.¹

Where a husband and wife live together, the mere fact of cohabitation raises a presumption that she has authority to pledge his credit for necessities suitable to the style in which they live; but there is no presumption of authority to borrow money in his name, even for the purpose of purchasing necessities for the price of which he would have been liable if they had been bought on his credit.²

The presumption of authority arising from co-habitation may be rebutted by proof :—

- (a) that she had not in fact authority to pledge his credit; or
- (b) that she was already adequately provided with necessities, or that her husband had made her a sufficient or agreed allowance therefor.³

It is now settled in England that “the question whether a wife has authority to pledge her husband’s credit is to be treated as one of fact, upon the circumstances of each particular case, whatever may be the presumption arising from any particular state of circumstances.”⁴ The presumption of authority arising from cohabitation is confined to necessities suitable to the style in which the husband chooses to live.⁵ If the wife orders things which are not suitable to his style of living,⁶ or are of an extravagant nature, or are excessive in extent,⁷ there is no presumption of authority, and the husband is not liable, unless it is proved that he has expressly authorised her, or held her out as having authority, to give the orders, or that he has ratified the transactions. The question whether the things are suitable necessities is a question of fact; and the burden of proof lies on the person supplying them, except in the case of such things as wearing apparel delivered at the joint residence, which are presumed to be necessities until the contrary is shown.⁸ The mere fact that the wife has a separate income is not sufficient to rebut the presumption of authority.⁹ Thus, a person dealing with a wife and seeking to charge her husband must show either that the wife is living with her husband and managing the household affairs, in which case an implied agency to buy necessities is presumed,¹⁰ or he must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance, when, of course, the law would give her an implied authority to bind him for necessities supplied to

1. Mechem, ss. 161 and 187 and authorities cited therein, Katiar, p. 73.

2. Bowstead, Article 12, p. 24 and the authorities cited therein.

3. *Ibid.* p. 25 and the authorities cited therein.

4. *Debenham v. Mellon* 6 A. C. 24, 31, cited in *Robinson v. Rigg*, 34 A. L. J. 50

5. *Phillipson v. Hayter*, [1870], 40 L. J. C. P. 14.

6. *Harrison v. Grady*, [1865], 13 L. T. 369; *Montagu v. Benedict*, [1825], 5 D. & R. 532; *Atkins v. Curwood* [1837], 7 C. & P. 756.

7. *Debenham v. Mellon*, [1880], 50 L. J. Q. B. 155; *Lane v. Ironmonger* [1844], 14 L. J. Ex. 35; *Freestone v. Butcher* [1840], 9 C. & P. 643.

8. *Jeashury v. Newbold* [1857], 26 L. J. Ex. 247; *Clifford v. Laton* [1827], 3 C. & P. 15.

9. *Seymour v. Kingscote* [1922], 38 T. L. R. 386; *Callot v. Nash* [1923], 39 T. L. R. 292.

10. Not conclusively: *Debenham v. Mellon* [1880] 6 App. Cas. 24.

her during such separation in the event of his not providing her with maintenance.¹

Even in the case of suitable necessities, the presumption of authority may be rebutted by proof that she had no authority. The question whether the wife acted as her husband's agent, and with his authority, in any particular transaction, is a question of fact² and the proper question to leave to jury is whether the things were supplied to his credit and with authority, not merely whether they were suitable necessities.³ If she did not intend to pledge his credit, but contracted on her own behalf,⁴ or if, though she intended to pledge his credit, he had in fact forbidden her to do so,⁵ he is not liable, even if the person who supplied the necessities had been revoked,⁶ unless the husband had invested her with an appearance of authority, or had done some act leading the plaintiff to suppose that she had his authority to order them.⁶ But if a husband, by words or conduct, holds his wife out as having authority, he is liable to any person dealing with her on the faith of such holding out, notwithstanding a revocation of her authority, and though he had expressly forbidden her to pledge his credit, unless such person had actual notice of the revocation or prohibition.⁷

The liability of a husband for his wife's debts depends on the principles of agency, and he can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done.⁸ As already noticed, a husband is not liable for the debt contracted under his express authority or under circumstances of such pressing necessity that his authority may be implied. A wife, therefore, is not justified in borrowing money to pay a debt due by her husband and his brother for meeting the expenses of cultivation nor can she pledge the husband's credit for a joint loan taken by his brothers in which his liability would extend to the whole debt.⁹ No agency on the wife's part for her husband was established where the husband and wife always lived together, the wife had an allowance to meet the household expenditure and her personal expenses and the money had been borrowed without the husband's knowledge and not to meet any emergent need but to pay off previous debts and had been raised by successive borrowings over a considerable period, the debt having increased by high rates of interest.⁹

1. *Virasvami v. Appasvami*, (1863) 1 M. H. C. 375. The authority of necessity, where it exists, is altogether independent of contract. See also *Girdhari v. Crawford*, (1885) 9 All. 147, 155.; *Kanshi Ram v. B. Nisbett*, 1920 Lah. 18= 116 I. C. 618, English couple.

2. *Lane v. Ironmonger* (1844), 13 M. & W. 368; *Freestone v. Butcher*, (1840), 9 C. & P. 643.

3. *Reid v. Trakle* (1853), 13 C. B. 627; *Shoolbred v. Baker* (1867), 16 L. T. 359.

4. *Freestone v. Butcher* (1840), 9 C. & P. 643.

5. *Jolly v. Rees* (1864), 33 L. J. C. P. 177; *Debenham v. Mellon*, *supra*; *Mohammad Sultan Sahib v. Horace Robinson*, I. L. R. 30 Mad. 543; *Morel Bros. & Co. v. Westmoreland* (1903) 1 K. B. 64.

6. *Jolly v. Rees* (1884), 33 L. J. C. P. 177; *Debenham v. Mellon* (1880). 50 L. J. Q. B. 155.

7. *Jetley v. Hill* (1884), 1 C. & E. 239; *Filmer v. Lynn* (1835), 4 N. & M. 559; *Debenham v. Mellon* *supra*.

8. *Girdhari v. Crawford*, 9 All 147 (F. B.)

9. *Busi v. Mahadeo Prasad*, 3 All. 122-case of a Hindu husband.

In *Mahmmad Sultan Sahib v. Horace Robinson* been held that a European husband is not liable for the price of goods supplied to his wife, where the husband was remitting to her sums amply sufficient for her maintenance and had expressly forbidden his wife to pledge his credit, and, further, the wife kept a boarding-school and was in receipt of payment made by the parents of children boarding with her.

Much the same principles apply to Hindus. A Hindu wife living separate from her husband because of his marriage with a second wife has no implied authority to borrow money for her support, as the second marriage does not justify separation.²

But when a woman governed by the provisions of the Married Women's Property Act, 1874, has separate property of her own,³ the presumption would be that she was not pledging her husband's credit. A European wife subject to the last mentioned Act carried on the business of a milliner, and the husband had no concern in it; it was held that he was not liable for debts contracted by the wife in the management of that business.⁴ But, whatever be the law to which the parties are subject, it is clear that there can be no presumption of agency where moneys are borrowed by a woman in her own right as heir to her husband under the belief that the husband is dead. In such a case the lender must be taken to have dealt with the woman in her own right, and not looking in any way to the husband as responsible for the debt.⁵

Implied
authority of
wife as
house-keeper

Where a wife, who is living with her husband, has the management of the household, she is his general agent in all household matters, and has implied authority to pledge his credit for all such things as are necessary in the ordinary course of such management, and are usually bought on credit.⁶

Every act done by a wife within the scope of her implied authority as manager of his household binds the husband, unless she has in fact no authority to do the particular act, and the person dealing with her has, at the time of the transaction, notice that she is exceeding her actual authority.⁷

In *Ruddock v. Marsh*,⁸ the wife of a labourer ordered provisions for the house. The husband was held liable for the price, though he had supplied his wife with sufficient money to keep the house, the person supplying the goods having had no notice of that fact. In *Holt v. Brien*,⁹ a husband, during temporary absence from home, made his wife a sufficient allowance for herself and the family. A tradesman supplied her with goods on credit, knowing that the husband had made her the

1. (1907) 30 Mad. 543

2. See *Viraswami v. Appaswami*, (1868) 1 M. H. C. 375; *Nathubhai v. Jacher* (1876) 1 Bom. 121, 123.

3. See notes on page 83.

4. *Allumuddy v. Braham* (1878), 4 Cal. 140.

5. *Puri v. Mahadeo Prasad*, (1880) 3 All 122.

6. Bowstead, Article 13, p. 26 citing *Emmett v. Norton* (1838), 8 C. & P. 506; *Phillipson v. Hayter* (1870), 40 L. J. C. P. 14; See also *Kanshi Ram v. B. Nisbett* 1929 Lah. 18=116 I. C. 618 and *Viraswami v. Appaswami*, 1 M. H. C. 375

7. *Ibid*

8. [1857], 1 H. & N. 601 But see *Muel v. Westmoreland*, [1904] A. C. 11.

9. [1883], 4 B. & A. 252.

allowance. Held, that the husband was not liable for the price of the goods.

The implied authority of a wife as house-keeper is, however, confined to domestic necessities suitable to the style in which the husband lives, and it does not extend to articles of luxury.¹ The onus of proof that goods supplied on her orders are suitable necessities lies on the persons supplying them.²

A wife has an implied authority to pledge the credit of her husband for necessities and this implied authority is not taken away or diminished by reason of her husband's insanity. Such authority is, however, limited to necessities. She has no power to acknowledge a debt due from her husband.²

Under the English law it has been held that where husband and wife are separated by mutual consent, and there is an agreement between them as to her maintenance, she has no implied authority to pledge his credit so long as he duly complies with the terms of the agreement, whether she is adequately provided for or not; but if the terms of the agreement be not duly complied with by the husband, then she has implied authority to pledge his credit for necessities suitable to her station in life.³ And where husband and wife are separated by mutual consent, and there is no agreement between them as to her maintenance she has implied authority to pledge his credit for necessities suitable to her station in life, unless she has adequate separate means, or is provided with an adequate allowance, either by her husband or some other person.⁴ Where the wife is permitted to have the custody of the children, necessities for them are deemed to be necessities for her.⁵

Where separated by mutual consent.

In *Biffin v. Bignell*,⁶ the court of Exchequer laid down that, where a husband consents to a separation on condition that his wife shall accept a certain allowance, she has no implied authority to pledge his credit so long as the allowance is duly paid, even if it be inadequate, unless he has been guilty of such misconduct as to justify her in living apart without his consent; because, by not fulfilling the conditions on which his consent was given, she is, in effect, living apart without his consent. But in *Negus v. Forster*,⁷ where there had been an agreement for a separation with an allowance of £ 100 a year, and the parties had resumed cohabitation, and then again separated and the wife had subsequently obtained a judicial separation with alimony of £ 180 a year, on the ground of the husband's misconduct prior to the second separation, it was held by the Court of Appeal that the £ 100 a year having been regularly paid, the original separation deed was a good defence to an action for the price of necessities supplied to the wife after the second separation but before the decree for judicial separation and alimony. And it would, therefore, seem that misconduct of the

1. *Phillips v. Hayter* [1870], 40 L. J. C. P. 14.

2. *Gomathi Ammal v. Ann Ammal*, 1933 Mad. 686=56 Mad 964=146 I.C. 49.

3. *Bowstead*, Article 15, p. 28 and the authorities cited therein.

4. *Ibid.*

5. *Ibid* citing *Bawlyns v. Vandye* [1800], 3 Esp. 250.

6. [1862], 31 L. J. Ex. 189=7 H. & N. 877.

7. (1882), 46 L. T. 676, C. A.

husband, combined with inadequacy of the wife's income, does not give her implied authority to pledge his credit, where the amount of such income has been expressly agreed upon and is duly paid.

Where no
agreement
as to
maintenance

Where there has been no agreement as to the amount of her allowance or as to her maintenance, the liability of a husband, who consents to his wife living apart, for the price of necessities supplied to her on his credit depends upon whether she is adequately provided for or not. If he pay her an adequate allowance she has no implied authority to pledge his credit,¹ and he is not liable for the price of things supplied to her, even if the person supplying them has notice of the allowance.² So, he is not liable for the things supplied to her, if he can show that she has adequate separate means,³ or that she receives adequate maintenance from some source, whether he supplies it or not.⁴ The question of adequacy is a question of fact. If the allowance is adequate and she is not otherwise sufficiently provided for according to her station in life, she has implied authority to pledge his credit for suitable necessities, though she may have acquiesced in the amount of the allowance.⁵

In India also it has been held that in cases of separation it must be shown that there existed such a state of things as would warrant the wife in living apart from her husband and claiming support or maintenance to bind him for necessities supplied to her during such separation in the event of his not providing her with maintenance.⁶ If the husband and wife are living separately by mutual consent and the wife has no other means of subsistence, even then the husband can claim to be absolved from liability by proving *inter alia* that, under the terms of the separation, he had agreed to make an allowance and that such allowance had been paid by him; otherwise his normal duty to maintain his wife continues.⁷

Under the Hindu Law a wife who has voluntarily separated from her husband, without any circumstances justifying her separation is liable for debts contracted by her (even for necessities) although without her husband's consent; but her liability is limited to the extent of any *stridhan* she may have.⁸ A Hindu married woman contracting jointly with her husband is liable to the extent of her *stridhan* only.⁹

There is no provision in Mohammadan Law allowing the wife unconditionally to pledge her Hanafi husband's credit to

1 *Mizen v. Pick*, (1838), 7 L. J. Ex. 153, *Holder v. Cope* (1846), 2 C. & K. 437; *Emmett v. Norton*, (1838), 8 C. & P. 506; *Hodgkinson v. Fletcher*, (1814), 4 Camp. 70.

2 *Reeve v. Conyngham* (1847), 2 C. & K. 444; *Mizen v. Pick*, *supra*.

3 *Lidlow v. Wilmot* (1817), 2 Stark. 86.

4 *Clifford v. Laton* (1827), 3 C. & P. 15; *Dixon v. Hurrell*, (1838), 8 C. & P. 717.

5 *Hodgkinson v. Fletcher* (1814), 4 Camp. 70.

6 *Virasami v. Appasami*, 1 M. H. C. 375.

7 *Kanshi Ram v. Nisbett*, 1929 Lah. 18=116 L. C. 618.

8 *Natubhai Bhirilal v. Jashver Rajji* 1 Bom. 121; *Virasami v. Appasami*, 1 M. H. C. 375.

9 *Naratam v. Nanka*, 6 Bom. 473; In re petition of *Radhke*, 12 Bom. 228; *Govindji v. Lakmidas*, 4 Bom. 318.

secure money for maintenance where the husband deserts his wife.¹

There are no presumptions *de facto* or *de jure* that a Burmese Buddhist couple living together are agents for each other, or that the wife is deemed to consent to the acts of her husband and it is a question of fact to be determined according to the circumstances of each case.² The principle that a liability incurred by a Burmese Buddhist husband for the joint purpose of himself and his wife binds his wife, based upon the presumption that the wife has consented to the incurring of such liability, cannot be of avail where the wife has expressly withheld her consent.³

It has also been held under the English law that where a wife leaves her husband without his consent, or lives apart from him contrary to his wishes, she has no implied authority to pledge his credit, unless he has been guilty of such misconduct as to justify her in so leaving him or living apart.⁴

Where living apart without the husband's consent.

Under the English law, where a wife has been deserted by her husband, or has been turned away by him without adequate cause, or has left him in consequence of misconduct on his part justifying her in so leaving him, and is living apart from him, it is an *irrebuttable* presumption of law that she has authority to pledge his credit—

Where living apart in consequence of husband's misconduct etc.

(a) for necessities suitable to her station in life, unless she is adequately provided for;

(b) for costs reasonably incurred in taking proceedings against him, and

(c) where she has been given the custody of the children by reason of his misconduct, for their maintenance and education, even if they be living with her contrary to his wishes.⁵

Where a wife is separated from her husband under any of the circumstances specified above, he is bound in equity to repay money lent to her for, and expended in, the purchase of necessities.⁶

The authority referred to above is said to be an authority of necessity,⁷ and the husband is bound to pay for things ordered by the wife in the exercise thereof, even if he gave the person supplying them express notice not to trust her.⁸ The fact that he makes her an allowance is no defence, if the allowance be inadequate.⁹ But where alimony has been decreed, and duly paid, it will be presumed by the court to be sufficient.¹⁰

1. *Mandy Mathar v. Bijan Bn*, 1930 Mad. 234=121 L. C. 846.

2. *Chettyar Firm v. Mg. Than Daing*, 1931 Rang. 262=9 Rang. 524=134 L. C. 1252; *Ma Byaw v. Mg. Tun*, 1934 Rang. 341=153 L. C. 331.

3. *San Ya v. P. R. Firm*, 1936 Rang. 396.

4. Bowstead, Art. 16, p. 30 citing *Hindley v. Westmeath* (1827), 6 B. & C. 200; *Johnston v. Sumner* (1858), 27 L. J. Ex. 841; *Swan v. Mathieson* (1911), 103 L. T. 832.

5. Bowstead, Art. 17, p. 30 and authorities cited therein.

6. *Ibid*, citing *Jenner v. Morris*, (1861), 30 L. J. Ch. 361; *Deare v. Soutten* (1869), L. R. 9. Eq. 151; *Harris v. Lee* (1718), 1 P. W. 482; *May v. Skey* (1849), 16 Sim. 588, is overruled.

7. *Johnston v. Sumner* (1858), 27 L. J. Ex. 341.

8. *Harris v. Morris* (1801), 4 Esp. 41.

9. *Baker v. Sampson* (1863), 14 C. B. (N. S.) 383.

10. *Willson v. Smyth* (1831), 1 B. & Ad. 801.

What degree of misconduct justifies a wife in leaving her husband? It was decided in *Horwood v. Heffer*¹ that no amount of ill treatment, short of personal violence, or such as to induce a reasonable fear of personal violence, would entitle a wife to pledge her husband's credit after leaving his house without his consent. But in *Houliston v. Smyth*² it was laid down that such conduct as bringing a prostitute into the house, or threatening to confine the wife in a madhouse, was equivalent to turning her away. It is clear that such cruelty as renders it no longer safe for the wife to remain in the house, or such conduct as renders it no longer safe for the wife to remain in the house,³ or such conduct as causes a reasonable apprehension of personal violence,⁴ justifies her in leaving her husband, and living apart from him.

It has also been held under the English law, that where a wife is turned away by her husband or is compelled to leave him in consequence of his violence, and it is necessary to take proceedings to oblige him to keep the peace, he is liable for the costs of such proceedings, as between solicitor and client even if he allow her an adequate separate maintenance.⁵ So, a wife has implied authority to pledge her husband's credit for costs, as between solicitor and client, reasonably incurred in the institution and prosecution of proceedings for divorce.⁶ And it has been held that he is liable for cost incurred by her in filing petition for judicial separation, even if it be not proceeded with, provided there are reasonable grounds therefor.⁷ But in such cases the solicitor ought, before commencing proceedings, to make proper investigation and inquiry into all the circumstances; and he is not entitled to recover the costs from the husband in the absence of success unless he can show that there was at least great probability of success.⁸ In *Wilson v. Ford*⁹ where a husband had deserted his wife without cause, and left her without means of subsistence, it was held that she had implied authority to pledge his credit for the costs (a) of a suit for restitution of conjugal rights; (b) of taking counsel's opinion as to whether a verbal promise of a settlement made by the husband at the time of the marriage could be enforced in equity; and (c) of consultations with her solicitor as to the best means of dealing with tradesmen who had supplied her with necessaries and were pressing her for money, and also with the landlord of a house in which she and her husband had

1. (1811), 3 Taunt. 421.

2. (1825) 3 Bing. 127=28 R. R. 609; *Tempany v. Haksuill* (1858), 1 F. & F. 438.

3. *Emery v. Emery* (1827), 1 Y. & J. 501; *Baker v. Sampson*, supra; *Hodges v. Hodges*, (1796), 1 Esp. 441.

4. *Brown v. Ackroyd* (1856), 25 L. J. Q. B. 193.

5. *Shepherd v. Macknail* (1813), 3 Camp. 326; *Turner v. Rooks* (1839), 9 L. J. Q. B. 211; *Williams v. Fowler* (1825), Mclel & Y. 269.

6. *Ottaway v. Hamilton* (1878), 3 O. P. D. 393; *Re Wingfield*, (1904) 2Ch. 665; *Abrahams v. Buckley*, (1924) 1 K. B. 908.

7. *Rice v. Shepherd* (1862), 12 O. B. (N. S.) 332; *Brown v. Ackroyd* (1856), 25 L. J. Q. B. 193; *Taylor v. Haslstone* (1882), 52 L. J. Q. B. 101. But see *Cale v. James* (1897) 1 Q. B. 418.

8. *Re Hooper, Baylis v. Watkins* 1864, 33 L. J. Ch. 300; *Walker v. Walker* 1897, 76 L. T. 234; *Beer v. Beer*, 1906, 22 T. L. R. 367.

9. (1868), L. R. 3 Ex. 63=37 L. J. Ex. 60; See Bowstead, pp. 31, 32.

lived, who was threatening to distrain for rent, upon furniture which had been hers before marriage.

Again, it has been held under the English law that a husband is under no obligation to support his wife, and she has no implied or presumed authority to pledge his credit, whether they live together or not and even if he has himself been guilty of misconduct after she has committed adultery, unless he connived at or has condoned the offence. Provided that, if, being aware of her adultery, he continues to hold her out as his agent, he is liable to the same extent as if her authority had continued, with respect to any persons dealing with her on the faith of such holding out, without notice of the determination of her authority. Where a husband connives at or has condoned his wife's adultery, her implied or presumed authority is not affected thereby.¹ In *Govier v. Hancock*,² a husband committed adultery with a woman whom he brought to the house where he lived with his wife, and, after treating his wife with great cruelty, turned her out of doors. There the wife committed adultery, after which she offered to return home, but her husband refused to receive her. Held, that the husband was not liable for necessities supplied to her after her adultery.² In *Norton v. Fazan*,³ a husband, knowing of his wife's adultery, permitted her to continue living in his house with the children. Held that he was liable for the price of necessities supplied to her by a tradesman who was ignorant of the circumstances.

Effect of
adultery by
the wife.

A husband turns his wife away without cause. She commits adultery. He is not liable for goods supplied to her after the adultery, although the person supplying them had no notice of the adultery,⁴ and the goods were necessities.⁵ A wife who has committed adultery has no implied authority, in the absence of connivance or condonation by her husband, to pledge his credit for the costs of divorce proceedings brought by her⁶ or by her husband;⁷ and this prevails, although the wife's solicitor be unaware of her adultery and although the wife's offence consists of one act of adultery only.⁸ Where a husband connives at his wife's adultery, and then turns her away, she has implied authority to pledge his credit for necessities, and he is liable for the price thereof, even if he gave express notice to the person supplying them not to trust her.⁹ The same rule applies if a husband condones his wife's adultery, and subsequently turns her away.¹⁰

It has also been held under the same law that whenever a wife has authority to pledge her husband's credit, she has also implied authority to acknowledge on his behalf a debt incurred

Acknowledg-
ment of debt.

1. Bowstead, Article 18, p. 33 and authorities cited therein.
2. (1796) 6 T. R. 603.
3. (1798), 1 B. & P. 226.
4. *Emmett v. Norton* (1838), 8 C. 506; *Atkyns v. Pearce* (1857), 26 L. J. C. P. 252.
5. *Hardie v. Grant* (1838), 8 C. & P. 512; *Cooper v. Lloyd* (1859), 6 C.B. (N.S.) 519.
6. *Durnford v. Baker* (1924), 2 K. B. 587.
7. *Arnold v. Amari*, (1928), 1 K. B. 584.
8. *Wright v. Annandale*, (1930), 2 K. B. 8=99 L. J. K. B. 444, C. A.
9. *Wilson v. Glossop* (1886) 20 Q. B. D. 354.
10. *Harrie v. Morris*, (1801), 4 Esp. 41; *Robinson v. Gosnold* (1708), 6 Mod. 171.

in pursuance thereof.¹ But no husband is liable for the price of necessities supplied to his wife, whether they live together or not, where exclusive credit is given to the wife,² or to some third person, by the person supplying them.³ Thus, where a wife, separated from her husband with his consent, lived with her uncle, and ordered necessities from a tradesman who gave credit to the uncle, and whose former bills for goods supplied to her had been paid by the uncle, it was held that the husband was not liable, though he did not make his wife any allowance.⁴ But the mere fact, that the things are booked in the wife's name is not conclusive evidence of an intention to give credit to her alone. The jury must be satisfied that, at the time when the contract was made, the person supplying the things intended to give credit to her to the exclusion of her husband.⁵ If, however, the wife be sued to judgment, that is conclusive evidence of an election to give exclusive credit to her.⁶

Where the wife executes a mortgage deed to secure the payment of money due on a promissory note from herself and the husband afterwards acquiesces in the mortgage and so ratifies her action, she can be said to have been acting as her husband's agent to the best of her ability.⁷ Where the wife is carrying on her own business she is liable for debts contracted in the course of her business and not the husband. The implication that the wife is impliedly carrying on the business as the agent of the husband is excluded by the Married Women's Property Act, III of 1874.⁸

Authority
presumed
from cohabitation
as
man and
wife.

Under the English law, where a man lives with woman as his wife she has authority to pledge his credit, during the continuance of the cohabitation, to the same extent as if she were legally married to him.⁹ Where there is no cohabitation, mere fact that a man permits a woman to assume his name is not sufficient to raise a presumption of authority to pledge his credit.¹⁰ But if they live together as man and wife, he is liable for the price of necessities supplied to her on his credit, even if the tradesman knew when he supplied them that they were not married.⁹ This presumed authority determines on a separation, and the mere fact that he had represented her to be his wife does not render him liable for the price of necessities supplied to her after the separation.¹¹ If, however, he held her out to third persons as his agent, they are entitled to deal with her as such, and to charge him accordingly, until they receive notice that the connection has determined.¹²

1. Bowstead, Article 19, p. 34.
2. Bowstead, Article 20, p. 34 citing *Bentley v. Griffin* [1814], 5 Taunt. 356, *Metcalf v. Shaw* [1811], 3 Camp. 22; *Caillot v. Nash* [1923], 39 T. L. R. 292.
3. Bowstead, Article 20, p. 34.
4. *Harvey v. Norton* [1840] 4 Jur. 42 See also *Reeve v. Conyngham*, [1847], 20 A. K. 444.
5. *Jewsbury v. Newbold* [1857], 26 L. J. Ex. 247.
6. Bowstead, p. 35.
7. *Maung Sin v. Po*, 12 I. C. 28.
8. *Allumuddy v. Braham*, 4 Cal. 140.
9. Bowstead, Article 21, p. 35, citing *Watson v. Threlkeld* (1794), 2 Esp. 637, *Ryan v. Sams* (1848), 12 Q. B. 460; *Blades v. Fleet* (1829), 9 B. & C. 167.
10. *Gomme v. Franklin* (1859), 1 F. & F. 465.
11. *Munro v. De Chenant* (1815), 4 Camp. 215.
12. *Ryan v. Sams* (1848), 12 Q. B. 460.

If an appearance of authority to pledge the husband's credit is once, in fact, created by the husband's acts, or by his assent to the acts of the wife, then as between the husband and the wife's creditor it cannot be got rid of by a mere understanding between the husband and the wife but the creditor is entitled to notice of revocation of the wife's authority to pledge her husband's credit any longer.¹ Thus, where a lady had her husband's express authority to act as his agent and did so act and there was no misrepresentation on the wife's part, the husband was held liable.² The liability of a person who cohabits a woman and allows her to be supplied goods on his credit continues until tradespeople have been informed of the termination of such connection,³ or until his death when his executor will not be liable.⁴ "The authority of a wife to pledge the credit of her husband is a delegated not an inherent authority. If she bind him, she binds him only as agent. This is a well established doctrine. If she leaves him without cause and without consent she carries no implied authority with her to maintain herself at his expense. But if he wrongfully compel her to leave his home, he is bound to maintain her elsewhere."⁵

Revocation
of wife's
authority

See also notes under "revocation of agent's authority."

Children have no implied authority as such to pledge the credit of their parents even for the supply of necessities.⁶ In the absence of proof of an express or implied contract on his part, a father is no more liable than a stranger for debts incurred by his children without his authority; and the obligation to maintain his children affords no legal inference of a promise to pay for necessities supplied to them.⁷ To render a partner liable for things supplied to his child the person supplying them must give some evidence of his authority or assent.⁸ Where a minor has ordered suitable necessities, and some evidence of authority has been given, it is a question for the jury whether the circumstances of the case are such as to justify them in inferring that they were ordered with the father's authority.⁹ In such cases, slight evidence of authority is sufficient to establish a case for the jury.¹⁰

Child's
implied
authority
to pledge
parent's
credit

There are usually two kinds of cases put under this heading. First, cases which illustrate the proposition that an agent who is employed for a particular purpose may under circumstances of urgency and necessity do things on behalf of his principal, or the property entrusted to him by such principal, which he would not have authority to do but for the necessity.¹¹ There is also a second kind of a case, in which it is alleged that a mere stranger acting for the principal without any authority, or

(d) Agent of
necessity.

¹ *Debenham v. Mellon* 6 A. C. 24, 30.

² *Penguin Ltd. v. Beauchamp*, 1906 A. C. 148.

³ *Ryan v. Sams*, 174 L. J. Q. B. 271.

⁴ *Blades v. Free*, 9 B. & C. 167; See *Smout v. Ibrey*, 12 L. J. Ex. 357.

⁵ *Wilson v. Glossop*, 20 Q. B. D. 354 citing *Eastland v. Burchell* 83 Q. B. D. 492.

⁶ *Bowstead*, Article 22, p. 36.

⁷ *Shelton v. Springett* [1851], 11 C. B. 452; *Mortimer v. Wright* [1840] 6 M. & W. 482; *Crantz v. Gill* [1796] 2 Esp. 471.

⁸ *Rolfe v. Abbott* [1833], 6 C. & P. 286.

⁹ *Law v. Wilkins* [1837], 6 A. & E. 718; *Baker v. Keen* [1819], 2 Stark. 501.

¹⁰ *Ibid.*

¹¹ See *Langan v. G. W. R. Co.* [1874], 30 L. T. 173, at p. 177.

without an authority being subsequently conferred on him by ratification, becomes an agent, under circumstances of positive necessity such as when irreparable injury to property by fire or some other calamity would arise but for his interference. Under such circumstances it is said that a mere stranger becomes an agent of necessity of the principal, and can make the principal liable by his acts.¹

The first kind of case, where exceptional authority is held to be conferred on an agent through the necessity of the case arises where it is *impossible to communicate with the principal*. An authority of necessity is conferred by law in certain cases where an agent in the course of his employment, is faced with an emergency in which the property or interest of his principal is in imminent jeopardy and it becomes necessary, in order to preserve the property or interests of the principal to act before the principal's instructions can be obtained. There are a number of cases in which such authority has been held to be conferred on the master of a ship, by virtue of the necessities of the case, as where he has had to make arrangements for the safety of the ship or its cargo, and there was no means of communicating with the owner of the ship or of the cargo. Necessity for this purpose has been held to be equivalent to a high degree of expediency.² In the case of a carrier it arises where goods are in his possession and it becomes necessary to provide for their safety or preservation,³ or, where the goods are perishable, to sell them in the best interest of the owner.⁴ It has been held that, where, under a contract of sale to a buyer in a foreign country, goods were exported which were not in accordance with the contract, and the buyer could not act reasonably or consistently with the interests of the seller, return them, the buyer might act as agent for the seller in selling the goods⁵; and that sellers of goods to a buyer abroad, to whom owing to war conditions, they could not deliver, and with whom they were unable to communicate might re-sell as the original buyer's agents of necessities,⁶ but the latter decision has been strongly criticised and it seems doubtful whether an agency of necessity would arise in either case.⁷

It has been held that the doctrine of agency of necessity has a limited application, probably confined to cases in which there is a contractual relationship of some kind, express or

1. See Wright's '*Principal and Agent*,' p. 49; Halsbury, Vol. I [2nd Edn.] p. 207 'Agency of necessity arises wherever a duty is imposed upon a person to act on behalf of another apart from contract and in circumstances of emergency, in order to prevent irreparable injury. It may also arise where a person carries out the legal or moral duties of another in the absence of default of that other, or acts in his interest to preserve his property from destruction.'
2. *Australasian Steam Navigation Co. v. Morse* (1872), L. R. 4 P. C. 222.
3. *G. N. Ry. v. Swaffield* (1874), 43 L. J. Ex. 69.
4. *Sims v. Midland Ry.* (1913) 1 K. B. 103. A real necessity must exist for the sale and it must be practically (commercially) impossible to get the owner's instructions in time as to what should be done; *Ibid*, *Springer v. G. W. Ry* (1921) 1 K. B. 267—89 L. J. K. B. 1010.
5. *Kemp v. Pryor* (1812), 7 Ves. 287.
6. *Prager v. Blatspiel*, (1924) 1 K. B. 566.
7. See *Jebara v. Ottoman Bank*, (1927) 2 K. B. 254 per Scrutton L. J. and see *Gwilliam v. Twiss*, (1895) 2 Q. B. 84, *Hawlayne v. Bourne*, 1841, 7 M. & W. 595 cited in Bowstead p. 18.

implied in existence already.¹ The courts have refused to extend the principle further than absolutely necessary. Thus the manager of a mining company, who as such had no authority to borrow, was held not entitled to borrow to save the materials belonging to the mine being seized under warrant of arrest² and similarly in another case the court held that a station master could not pledge his railway company's credit by employing a doctor to attend to an employee who was hurt in an accident, but held that the employment of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances, and such powers as are usually exercised by similar agents.³ The occurrence of exceptional circumstances during the carrying out of the act of agency, from the nature of the contract itself, necessitates its extension in the interests both of principal and agent—of the principal because otherwise his property or interests would be sacrificed; of the agent so that he shall have the necessary authority to preserve them and acquire rights against third parties for his principal and against the principal for his own remuneration, indemnity, etc. The authority arises only under urgent necessity; and, if questioned, it will be upon the party contracting with the agent to show that such was the nature of the circumstances.⁴ The conditions which entitle an agent to exceed his authority under the doctrine of necessity are (1) that he could not communicate with the principal; (2) that the course he took was necessary in the sense that it was in the circumstances the only reasonable and prudent course to take; and (3) that he acted *bonafide* in the interest of the parties concerned. At the same time, though a strong case is required it is not essential that any other course should be an impossibility.⁵

Where an agent is employed, and it is necessary that something should be done immediately for the safety of the property committed to him, he has been held to have authority to do it. Thus, a railway company were held entitled to send a horse to a livery stable keeper whose owner had not met it at the station, and the railway company had no safe accommodation for the horse.⁶

It has also been held under the English law that it is not enough to prove a necessity for the act or agreement to make the principal liable for the agent. The act or agreement must be for the principal's benefit. Thus, in two Admiralty cases it has been held that an agreement to save life, unless the principal is liable in case of death, is not one under which the principal

1. See Halsbury, Vol. I (2nd Edn.) Art. 364, p. 307.

2. *Hartayne v. Bourne* 1841, 7 M. & W. 595.

3. *Cox v. Midland Ry. Co.* [1849] 3 Ex. 268; but see *Langan v. G. W. R.* [1874], 30 L. T. 173; *Walker v. G. W. R.* [1867], L. R. 2 Ex. 228, where that case is to some extent reflected on.

4. Halsbury, Vol. I (2nd Edn.), p. 208 citing *The Bonita*, *The Charlotte* [1861], 5 L. T. 141; 41 Digest 293; *The Gratitude* [1801], 3 Ch. Rob. 240; 41 Digest 504; *Benson v. Duncan* [1849], 3 Exch. 644; 41 Digest 416; *Gibbs v. Grey* [1857], 2 H. & N. 22.

5. Halsbury, Vol. I (2nd Edn.), P. 208. and the authorities cited therein.

6. *G. N. R. v. Sleafeld* [1874], L. R. 9 Ex. 132.

is liable.¹ So in *The Mariposa* it was held that as the owners were not liable to the passengers for not conveying them to their destination, if the ship should be wrecked, the master could not make the owners liable by contracting with another ship to take them to their destination, but that in such arrangement he must be held acting as agent for the passengers themselves.²

Mere stranger cannot be agent of necessity.

In none of the cases referred to above, was the question raised as to whether an entire stranger could make the principal liable for his acts as an agent of necessity. In *Nicholson v. Chapman*,³ the defendant, who had rescued out of a river some of the plaintiff's logs which had been improperly secured, refused to allow plaintiff to take possession of them without being paid for his services. He claimed the plaintiff was liable for such services on the ground that he, the defendant, was an agent of necessity; but the Court held that the defendant had no such claims at law, and that the plaintiff was not liable for salvage, for the principle of salvage only applied to services rendered in respect of goods carried by sea. In *Goulliam v. Twist*⁴ it was sought to render the defendant liable in tort for the acts of a person who was alleged to be an agent of necessity, but as the Court held there was no necessity in fact, the point whether a stranger could make the principal liable for his acts as an agent of necessity was not decided. There the driver of an omnibus was prevented from driving by the police on the ground that he was drunk. His master's yard was a quarter of a mile away. A stranger volunteered to drive the bus to the yard, and the conductor and driver authorized him to do so. On the way to the yard the stranger drove over the plaintiff, who was a foot-passenger in the street, and for this injury the injured man sought to render the bus proprietor liable. The Court of Appeal unanimously held there was no necessity for the bus to be driven at all until the defendant, the proprietor, had been communicated with and therefore held that the stranger was not an agent of necessity. Lord Esher said he was much inclined to agree with Baron Parke in *Hawtayne v. Bourne*,⁵ that the doctrine of authority, by reason of necessity, was confined to the care of master of ship or the acceptor of a bill of exchange for the honour of the drawer, but Lords Justices A. L. Smith and Rigby seem to have been of opinion that such an agency might exist in other cases, though they did not decide the point, and this is the view also of Mr Justice Story.⁶ Wright's remarks on this question are to the following effect⁷ :—

"With all respect to such great authorities as the Lords Justices and Mr Justice Story, it appears difficult to see how a man can be held liable for the negligent acts of a stranger who becomes the self-constituted guardian of his property, and it seems fairer to treat him on the principle of an *executor de son tort*. It may be urged that it is for the public interest to encourage persons to protect property, but

1. *The Rempor* [1833], L. R. 8 P. D. 115, at p. 118; *The Mariposa* [1896], p. 273

2. *Ubi, supra*.

3. [1793], 2. H. Bl. 254

4. [1895], 2 Q. B. 84.

5. [1841], 7 M. & W. 595.

6. Story on Agency, Sec. 142.

7. "Principal & Agent", p. 52.

even to this there are very strong objections to be urged, as was pointed out by Baron Parke in *Nicholson v. Chapman*¹

In *Prager v. Blatenspiel, Stamp and Heacock Ltd*² again it was held that the doctrine was not to be confined to cases of carriers by land or sea of the acceptor of a bill of exchange for honour of the drawer, but this has been criticised. "The expansion desired becomes less difficult when the agent of necessity develops from an original and subsisting agency and only applies itself to unforeseen events not provided for in the original contract, which is usually the case where a shipmaster is an agent of necessity. But the position seems quite different when there is no pre-existing agency, as in the case of a finder of perishable chattels or animals, and still more difficult when there is a pre-existing agency, but it has become illegal and void by reason of war"³

It has been held that no lien arises in favour of a stranger who succours a stray animal⁴ and probably no money claim arises in this case. As already noticed, a wife deserted by her husband may pledge his credit as agent of necessity. Under the English law, an authority of necessity is said to arise in the case of acceptance of a bill of exchange for honour.⁵

As a rule, a principal cannot be made liable at all for the acts of a stranger not purporting to be done as his agent. But where an act is done in his name or professedly on his behalf without his authority by another person assuming to act on his agent, he may adopt or confirm such act as if done by himself or with his authority. The act then becomes as valid and effectual as if it had been originally done by his duly authorised agent, whether the person doing such act was an agent exceeding his authority or was a person having no authority to act for him at all.⁶ Ratification is the adoption as his own by a principal of an unauthorized act or contract of an agent or of an entire stranger.

(c) Agency by subsequent ratification.

Every act, whether lawful or unlawful, which is capable of being done by means of an agent, except an act which is in its inception void, is capable of ratification by the person in whose name or on whose behalf it is done.⁷ The effect of ratification is to invest the person who did such act, the person on whose behalf it was done and the persons in dealings with whom it was done with the same right, duties and liabilities in all respects as if such acts were done with a previous authority and such persons had filled the positions of agent, principal and third persons respectively in a duly constituted agency.⁸

The doctrine of ratification being of considerable importance will form the subject of a separate chapter.

¹ [1793], 2 H. Bl. 254.

² [1924], 1 K. B. 566; *Digest Supp.*

³ Per Scrutton L. J. in *Jebara v. Ottoman Bank*, [1927] 2 K. B. 254, C. A. at p. 271; reversed *Sub nom Ottoman Bank v. Jebara*, [1928] A. C. 269; *Digest Supp.*; See Halsbury, Vol. I [2nd Edn.], p. 208.

⁴ *Binstead v. Buck* [1776] 2 Wm. Bl. 1117.

⁵ See Bills of Exchange Act, 1882 [45 & 46 Vict. C. 61]. S. 65; *Gutham v. Twist*, [1895], 2 Q. B. 84.

⁶ Bowstead, Article 26, p. 41 and authorities cited therein.

⁷ Bowstead Article 27, p. 42 and authorities cited therein.

⁸ *Ibid*, Article 32 p. 53.

CHAPTER V

AUTHORITY OF AGENTS.

28. Agent's authority may be expressed or implied. 29. Definitions of express and implied authority. 30. Extent of agent's authority. 31. Authority intentionally and directly conferred by some voluntary act of the principal. 32. Incidental powers which naturally and ordinarily attend acts as are necessary to give effect to the authority conferred. 33. Authorities conferred by custom or usage. 34. Authority inferred from an established course of dealings in the particular business. 35. Authority by necessity or urgency. 36. Apparent authority. 37. Authority inferred from previous conduct of the principal. 38. Authority conferred by subsequent adoption of the unauthorised acts of the agent by the principal.

28. Agent's authority may be expressed or implied.

The authority of an agent may be expressed or implied.

(S. 186, Indian Contract Act, 1872)

Agent's
authority-
General.

The relation of agency arises whenever one person called the agent has authority to act on behalf of another, called the principal and consents so to act.¹ The settlement of the terms of agency does not constitute a contract of agency unless authority to act is conferred and accepted. If a person does a commission agency business, he is not in law the agent of all the persons (or firm) for whom he transacts the business or from whom he hopes to get orders. The contract of agency is effected by the principal requesting the agent to buy or sell and by the agent indicating to consent so to act.² A broker is *prima facie* the agent of the party who first employs him. To make him an agent for the other parties there must be words or conduct by which an authorisation to act on behalf of the other parties is expressed or is to be affirmatively inferred.³

The authority of an agent may be considered from two points of view, the authority, which as between himself and his principal, he is invested with, and the authority which, as between the third party and the principal, the principal will be estopped in denying that his agent possessed. By the creation of the agency the principal bestows upon the agent a certain character. For some purpose, during some time and to some extent, the agent is to be the *alter ego*—the other half, of the principal. This purpose, time and extent are determined by the principal to suit the needs or objects which he has in view, and which the agent is expected to accomplish. These, however, are matters in which third persons have no part; they are considered and determined by the principal alone. What third persons are interested in is not the secret process of the principal's mind, but the visible result of those processes, the character in which the agent is held out by the principal to those who may have occasion or opportunity to deal with him. This character is a tangible, discernible thing, and, so far as third persons are concerned, must be held to be the authorised, as it is the only, expression and evidence from which the principal intends that they shall determine his purposes and objects.

1. See *Mohesh v. Radha*, 12 C. W. N. 28.

2. *Vishnji v. Jasaraj*, 50 I. C. 146.

3. *Handandas v. Mahori*, 8 I.C. 601.

They must conclude and have a right to conclude that the principal intends the agent to have and exercise those powers and those only, which naturally and properly belong to the character in which he holds him out.¹ The authority of an agent in any given case, therefore, is an attribute of the character bestowed upon in that case by the principal.²

What authority was really conferred and what was not conferred, are questions which primarily concern the principal and agent alone. Third parties are only to rely on the apparent state of things which indicates the character which he holds him out. Or in other words, it rests with the principal, in the first instance to determine what character he would impart but having made the determination and imparted the character, he must be held to have intended also the usual and legal attributes of that character.³

It must not, however, be supposed that third persons have a right to attribute to the agent any authority they please, and by doing so make it binding on the principal. The principal can confer as much or as little authority on the agent as he likes, and can impose as few or as many restrictions and limitations as he pleases. All such restrictions and limitations are binding on third persons, who know them or who are charged with notice thereof, in the same way and to the same extent as they are binding on the agent, provided the principal has done nothing to waive or nullify them.⁴ Secret and undisclosed instructions imposing any restrictions and limitations, however, do not affect the apparent authority so far as third parties are concerned. They are not binding on them.

The guiding factor in all such cases is thus the character bestowed by the principal. If the agent exceeds his authority by disobeying the instructions, which restrict or limit his authority, he does nonetheless bind the principal.⁵ In this respect authority of the agent is to be distinguished from his power although the two are often treated as synonymous. It may be in the power of an agent in a particular case to bind the principal to third persons by acts which are not within his authority as it stands between him and the principal.⁶

The authority of an agent may be express or implied. Its nature and extent may be defined by a power of attorney, a formal instrument under seal or registered, by writing not under seal or not registered, or by verbal instructions, or may be inferred from a course of dealing between the parties.⁷ Autho-

Agent's authority may be express or implied.

1 Mechem, § 709 cited with approval in *Harrison v. Kansas City Ry. Co.* 50 MO. App. 382. See Katlar, p. 127.

2 Mechem, § 709.

3 Mechem, § 709 and authorities cited therein.

4 See *Van Santvoord v. Smith*, 79 Minn. 316; *American Lead Pencil Co. v. Wolfe*, 30 Fla. 360 cited in Katlar, p. 128.

5 See *Hambro v. Burnand* [1904] 2 K. B. 10; *Heyworth v. Knight* 93 L. J. C. P. 298; *Re Hanley*, 4 Ch. D. 133; *Walter v. Drakford*, [1853], 1 E. & B. 749; *Nickson v. Brohon*, 10 Mod. 109; *Straus v. Francis* [1866], L. R. I. Q. B. 379; *Wright v. Bagg*, 15 Beav. 592; See Katlar, 128.

6 See Mechem, § 712.

7 *Pole v. Leask* [1860], 28 Beav. 562=29 L. J. Ch. 888, see also notes on pages 71 to 75.

rity may be implied from the situation of the parties, the circumstances of the particular case, the usage of trade or business, or the conduct of the principal.¹

*It is a general proposition of law that the authority, whether express or implied, of every agent is confined within the limits of the powers of his principal.*² Thus an agent of a corporation or incorporated company cannot have any authority, express or implied, to do any act on behalf of the corporation or company which is *ultra vires*.³

29. Definition of express and implied authority.

An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case ; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

ILLUSTRATION.

A owns a shop in Serampore, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purpose of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purpose of the shop.

(S. 187, *Indian Contract Act, 1872*).

As already observed, express authority may take the form either of some formal written instrument under seal or registered, or otherwise, such as a power of attorney ; or of some informal written instrument, such as a letter of instruction, or a written or oral request.⁴

Implied
authority.

The ordinary course of affairs must be regarded in order to ascertain the extent of an authority not defined except by the general nature of the business to be done. "A person who employs a broker must be supposed to give him authority to act as other brokers do."⁵

A power of attorney authorising the holder "to dispose of" certain property in any way he thinks fit does not imply an authority to mortgage the property.⁶ Nor does a power of attorney to an agent to carry on the ordinary business of a mercantile firm imply an authority to draw or indorse bills and notes.⁷ Authority on dissolution of partnership to settle the partnership affairs does not authorise the drawing, accepting, or

1 Bowstead, p. 56.

2 Bowstead, Article 33, p. 56 citing *Shrewsbury, etc. Ry., v. L. & N. W. Ry.* [1857], 6 H. L. Cas. 113, H. L. ; *Montreal Assurance Co. v. M. Gillway* [1859], 13 Moo. P. C. C. 87, P. C. ; *Poulton v. S. W. Ry.* [1867], L. R. 2 Q. B. 534 ; *Ashbury Carriage Co. v. Riche*, [1875], L. R. 7 H. L. 653.

3 *Ibid.*

4 See also notes on pages 71 to 75.

5 *Sutton v. Tatham* [1839] 10 Ad. & E. 27=50 R. R. 312, per Littledale J.

6 *Maiukchand v. Sham Moghan*, [1890] 14 Bom. 590 ; *Bank of Bengal v. Fagan*, (1849), 5 M. I. A. 27, 41.

7 *Pestonji v. Gool Mohd.* [1874] 7 M. H. C. 369. See Negotiable Instruments Act, 1881. S. 27.

indorsing of bills of exchange in the name of the firm¹ Where the principal carries on a general money-lending business, the authority to the agent to borrow implies an authority to pledge the principal's credit for the purpose of obtaining or securing advances from others to customers.²

Appointment of a "sole agent" does not preclude the principal from acting himself in the business of the agency without being accountable to the agent. Only an express prohibition would have that effect.³

As to implied authority of wife, see notes on pages 87 to 97.

Husband and wife.

30. Extent of agent's authority.

An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose or usually done in the course of conducting such business.⁴

ILLUSTRATIONS

- (a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt and may give a valid discharge for the same.
- (b) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials and hire workmen for the purpose of carrying on the business.

(S. 188, *Indian Contract Act, 1872*).

Abel v Sutton [1800] 3 Esp 108=6 R. R. 818. The following cases may also be referred to as illustrations: *Ezekiel v Carey & Co.* A. I. R. 1938 (Cal 423 (where agent is empowered to surrender shares in company belonging to principal he is not entitled to renounce newly issued shares), *Paboodan v Miller* A. I. R. [1938] Mad 906 (agent appointed to manage joint Hindu family has no implied authority to borrow moneys), *Goesdhandas v Friedmanns Diamond Trading Co.*, [1939] Mad 543 (An authority to ask, demand sue for, recover and receive money debts, etc. does not entitle agent to assign decree passed in favour of principal, *Tamrapur Municipality v Banwarilal*, 1939 All 623 (authority to receive payment of an amount does not imply an authority to recover it by instituting a legal process, *Ramanathan v Kunnappa*, 1940 Mad 650 (authority to adjust dispute does not authorise agent to refer matter to arbitration *Bank of Bengal v Ramanathan* [1916], 43 I. A. 48, 34=43 Cal 527 540= 42 I. C. 419

Bentall, Horsley & Baldry v Vicary, [1931] 1 K. B. 233

The English law on the subject is thus stated:

Every agent has implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way—*Bousted*, Article 38, p. 62

Every agent who is authorised to conduct a particular trade or business, or generally to act for his principal in matters of a particular nature or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such a trade or business, or of matters of that nature, or is within the scope of that class of acts, and whatever is necessary for the proper and effective performance of his duties, but not to do anything that is outside the scope of his employment and duties—*Bousted*, Article 39, p. 64

It has been held, but contrary to English authority not cited, that an agent having general authority to carry on the principal's business and receive and expend money therein has implied authority to borrow money so far as necessary for carrying on the business—*See Dhunpat Rae v Allahabad Bank*, A. I. R. [1927] Oudh 44=98 I. C. 783, *Contra, Hautayne v Bourne*, [1841] 7 M. & W. 595, 600=56 R. R. 806, 810, See Pollock & Mulla p. 597

"General"
or "special"
authority.

It will be noted that although Section 188 of the Indian Contract Act, 1872, makes no express mention of the terms, "general," or "special" authority, the first paragraph of that section purports to define the extent of the authority of what has been previously referred to as a *special* agent, and the second paragraph, the extent of the authority of a *general* agent.¹ The authority given to a special agent is said to include an authority to do every lawful thing which is necessary in order to carry the special authority into effect, whereas the authority given to a general agent is said to include not only the last mentioned authority, but also one to act in accordance with the usage of trade. From the first paragraph, therefore, it might be inferred that a special agent is not entitled to act according to the usages of trade; but this section must be read with §. 1 which enacts that nothing in the Act shall affect any usage or custom of trade, or incident of any contract, not inconsistent with the provisions of the Act.² Moreover, irrespective of this section, the words of section 188 appear sufficient to include a custom of trade. For if the words "to do everything necessary" in the first paragraph of section 188 are construed to include among other necessities a right to act according to the usage of trade, no difficulty will arise. This construction has already in England been put upon the word, "necessity" in *Clough v. Bond*³ by Lord Cottenham who in speaking of the nature of a loss incurred by a trustee, and remarking that a trustee is not liable for loss occasioned by an authorised investment, goes on to say: "So when the loss arises from dishonesty or failure of any one to whom the possession of part of the estate has been entrusted, *necessity*, which includes the regular course of business in administering the property, will in equity exonerate the personal representative." As to this remark, Jessel M. R., in *Speight v. Gaunt*⁴ says: "The value of that statement of the law is that he (Lord Cottenham) says 'necessity' which includes the regular course of business in administering the property, interpreting the word *as being nothing more and nothing less than the regular course of business*." It, therefore, follows, that whatever be the nature or extent of the authority, it is always, where there is no intention to the contrary expressed, construed to include an authority to do—

1. every lawful thing necessary for the purpose of carrying it into effect;
2. every lawful thing justified by the various usages of trade;
3. in an emergency, all such acts for the purpose of protecting the principal from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances.⁵

Authority of an agent so far as it relates to the rights and liabilities of third persons who happen to deal with him, is constituted by the following elements :—

1. See notes on pages 42, 43.

2. See notes on pages 7 and 8.

3. 3 My. & Cr., 490, 497.

4. L. R. 22 Ch. D. 797, (751), 745; L. R. 9 App. Cas. I.

5. S. 189, Indian Contract Act, 1872. See Pearson's 'Law of Agency,' pp. 109, 110.

- (1) Authority intentionally and directly conferred by some voluntary act of the principal.
- (2) Incidental powers which naturally and ordinarily attend acts as are necessary to give effect to the authority conferred.
- (4) Authority inferred from an established course of dealings in the particular business.
- (5) Authority by necessity or emergency.
- (6) Apparent authority.
- (7) Authority inferred from previous conduct of the principal.
- 8) Authority conferred by subsequent adoption of the unauthorised acts of the agent by the principal.¹

31. Authority intentionally and directly conferred by some voluntary act of the principal.

In determining the question of the existence and extent of the agent's authority, the starting point must, of course, always be to ascertain the authority, if any, which was expressly, consciously and intentionally conferred by the principal upon the agent.² When an agent is appointed he is entrusted with the performance of certain acts, or with the discharge of certain duties by the principal either by the express terms of appointment, or by being given a certain status, or character from which the intentions of the principal can be and are usually gathered as to the powers which he thereby means to confer. These voluntary acts of appointment, of expression of terms of such appointment, of putting in charge of certain business, and of giving a certain status or character by the principal always form the nucleus of the authority of the person so appointed.

A primary question in all cases in which authority of the agent is in question is what was the thing which the principal authorised the agent to do. It is not difficult to ascertain the nucleus where there exists an express or declared authorisation either of a single act or of a series of acts, though in the latter case it is somewhat less definite and more difficult to state in terms. Where, however, there was never any express or declared authorisation but the question whether the agent was authorised to act at all, and if so to what extent, must be determined from more or less confused or conflicting acts or circumstances, but nevertheless it will be necessary to do so. When this central authority has been determined we shall have to proceed to find out additional authorities, if any, gathered around this nucleus.³

32. Incidental powers which naturally and ordinarily attend such acts as are necessary to give effect to the authority conferred.

As already stated, an agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act. And, an agent having an authority to

Direct
authority of
an agent.

Everything
necessary
to give effect
to the
authority
conferred.

1. See Mechem, §§ 714—729; Katlar, p. 130.

2. Mechem, §. 714.

3. Mechem, §. 714. See also §. 729; Katlar, pp. 130, 131.

carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.¹ Thus, a merchant residing in India empowered by a person residing in England to recover in India a debt due to the latter, may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same,² and when so authorised he may receive payment in any way he may think fit.³

Illustrations
special
agents

Any authority given by endorsees to procure the discount of a note or bill includes an authority to warrant the bill, but not to endorse it in the name of the principal.⁴

A power to enter into, transact, complete, and execute all such negotiations, contracts or agreements, which might be deemed expedient to enter into for the purpose of obtaining a grant, demise, or lease of any mine or land, for the purchase of ore or the right to open, dig or work any mine, has been held to include a power to raise money on bills for the purpose of such transactions.⁵

An agent authorised to purchase certain railway shares has implied authority to do every thing, which, in the usual course of business, is necessary to complete the bargain.⁶

Where a partner gave his son power to act on his behalf in dissolving the partnership, with authority to appoint any other person as he might see fit, and the son submitted the accounts of the firm to arbitration, held that he was authorised so to do.⁷ So a power to an assignee of a business to take proceedings to enforce existing contracts, and otherwise to deal in respect thereof as he should think proper, will authorize him to refer to arbitration all matters arising out of the contracts.⁸

An authority to act for another generally during absence, empowers the donee of the authority to instruct a solicitor to appear on behalf of the donor of the power to show against an adjudication of bankruptcy against him.⁹

Where a certain person is authorised to receive and sell certain goods and to pay himself out of the proceeds, he has implied authority to bring an action against a third person wrongfully withholding possession of the goods.¹⁰

So also an agent employed to find a purchaser for a certain property has implied authority to describe the property and to state to the intending purchaser any facts or circumstances which may affect its value.¹¹ For the same reasons an agent employed by a horse-dealer to sell a horse privately has implied

1. S. 188, Indian Contract Act, 1872

2. *Pickford v. Evington*, 4 Dowl. 458; See illustration to S. 188.

3. *Barke v. Greenwood*, 2 Y. & C. 414.

4. *Fenn v. Harrison*, 4 T. & R. 177.

5. *Withington v. Herring*, 3 Moo. & P. 36.

6. *Bayley v. Wilkinson*, 18 L. J. C. P. 273; 7 C. B. 886

7. *Henley v. Soper*, 8 B. & C. 16, (21).

8. *Hancock v. Reid*, 2 L. M. & P. 584

9. *Frampton Ex-parte*, 1 De G., F. & J. 263

10. *Curtis v. Barclay*, 5 R. & C. 141

11. *Mullens v. Miller*, 22 Ch. D. 194.

authority to give a warranty on the sale of the horse,¹ but where such agent is employed not by a professional horse-dealer whose part of business is to give such warranty, but by a private person he has no implied authority to give such warranty² unless he is authorised to sell the horse at a public fair or at a public market where such warranty must be given.³ Where an agent is authorised merely to deliver a horse he has no implied authority to warrant it.⁴

An agent authorised to receive payment of a bill of exchange has no implied authority to receive such payment subject to a condition that the acceptor shall not be liable for the expenses of protesting the bill for non-payment.⁵

An agent employed only to find a purchaser for certain property is not authorised to receive the purchase-money.⁶

Where an agent is authorised by the principal to bid at auction for him, he has no implied authority to enter into an agreement with a third person and undertake the payment of a certain sum of money, if he abstains from bidding, and any such agreement if entered into by the agent is not binding on the principal.⁷

A person authorised to receive rent for his own benefit has no implied authority to distrain for it.⁸

When an agent is authorised to receive payment of money on his principal's behalf, the payment, in order to bind the principal must be in cash,⁹ unless it can be shown that, by a reasonable custom or usage of the particular business in which the agent is employed payment may be made in some other form, as for instance, by cheque¹⁰ or bill of exchange.¹¹

A custom for an agent to receive payment by way of set-off or settlement of accounts between himself and the person making the payment is regarded as unreasonable, and is not binding on the principal unless he was aware of it and agreed to be bound by it at the time when he authorised the agent to receive payment.¹²

From the illustrations cited above, it is clear that it is a fundamental principle in the law of agency that every express delegation of authority carries with it, unless the contrary be

1. *Howard v. Sheward*, L. R. 2 C. P. 118; *Bank of Scotland v. Watson*, 1 Dow. 45; *Baldry v. Bates*, 52 L. T. 620.

2. *Brady v. Todd*, 9 C. B. (N.S.) 592; overruling *Alexander v. Gibson*, 2 Camp. 555.

3. *Brooks v. Hassall*, 49 L. T. 569.

4. *Woodin v. Burford*, 3 L. J. Ex. 75.

5. *Bank of Scotland v. Dominion Bank*, 1891 A. C. 592 H. L. Sc.

6. *Mynn v. Jolliffe*, 1 M. & R. 326.

7. *Eshan Chunder Singh v. Shama Churn Bhutto*, 11 Mo. I. A. 7.

8. *Ward v. Shew*, 2 L. J. C. P. 58.

9. *Pape v. Westacott* (1894) 1 Q. B. 272; *Blumberg v. Life Interests, etc. Corporation* (1898) 1 Ch. 27; *Hine v. S. S. Ins. Syndicate*, (1895), 27 L. T. 79 (policy broker has no authority to take bill of exchange in payment).

10. *Bridges v. Garrett* (1870) L. R. 5 C. P. 451.

11. *Williams v. Evans* (1866), L. R. 1 Q. B. 352 (auctioneer no authority to take bill of exchange in payment of deposit.)

12. *Underwood v. Nicholls* (1855) 17 C. B. 239; *Pearson v. Scott* (1878) 9 Ch. D. 198; *Sweeting v. Pearce* (1859) 7 C. B. N. S. 449=121 R. R. 584 (custom for policy brokers to receive payment for underwriters by way of set-off).

expressed, implied authority to do all those acts, naturally and ordinarily done in such cases, which are reasonably necessary and proper to be done in these cases in order to carry into effect the main authority conferred. This doctrine rests upon the presumed intention of the principal that the main authority shall not fail because of the lack of express authority to do the incidental acts reasonably necessary to make that authority effective, and also upon the presumption that the principal expects the business to be done in the usual and ordinary way.¹ The incidental authority in every case will almost wholly be a question of fact.

This authority, however, must be carefully distinguished from the authority which arises by usage or custom, or which is the result of a special necessity or emergency. The acts which are deemed to be authorised being incidental to give effect to the authority conferred are those which are naturally or ordinarily necessary, that is to say, the acts which the principal presumptively would have included without question if his attention had been called to them, the acts which the ordinary competent person already familiar with the situation and with the ordinary methods of business, or a similar person having the situation made clear to him and considering the matter in the light of everyday experience, would say without serious hesitation, formed naturally and ordinarily a part of the main act authorised.²

General
agent-

The illustrations given above are illustrations of special agents or agents authorised to do a particular act. The same rule applies to general agents or agents authorised to carry on a particular business or trade or generally to act for the principal in matters of a particular nature or to do a particular class of acts. Every such agent has implied authority to do whatever is incidental to the ordinary conduct of such a trade or business, or of matters of that nature, or is within the scope of that class of acts and whatever is necessary for the proper and effective performance of his duties; but not to do anything that is outside the ordinary scope of his employment and duties.³ Similarly, it is a rule of the English Law that every agent who is authorised to do any act in the course of his trade, profession, or business as an agent, has implied authority to do whatever is usually incidental, in the ordinary course of such trade, profession, or business, to the execution of his express authority, but not to do anything which is unusually in such trade, profession or business, or which is neither necessary for nor incidental to the execution of his express authority.⁴

The authority conferred by section 188 of the Indian Contract Act, 1872, to do things necessary for a business may be excluded either expressly or impliedly by the terms of the agency. Thus where A appointed B manager of his silk factory,

1. See *Baldwin v. Gurrett*, 111 Ga. 876; *Bayley v. Wilkins*, 7 C. R. 886; *National Bank v. Old Town Bank*, 50 C. C. A. 443.
2. *Meehan*, §. 715, See also *St. Louis Gunning Advance Co. v. Wannamaker*, 115 Mo. App. 270; See *Katlar*, p. 132.
3. See *Bowstead*, Article 39, p. 64 and authorities cited therein; Part II of section 188 of the Indian Contract Act, 1872.
4. *Bowstead*, Article 40, p. 68 and authorities cited therein.

and executed to him a power of attorney specifying his powers and authority but the document gave no authority to B to borrow, it was held that A was not liable for money borrowed by B as manager and attorney of A. "Sections 187 and 188 ... would no doubt authorise a manager to borrow if necessary, but such general provisions are subject to modifications in particular cases, and in this case they were so modified, for the manager had been allowed no power to borrow."¹

A broker authorised to sell goods has implied authority to sell on reasonable credit, where there is no usage to the contrary;² to receive payment of the price in accordance with the terms of the contract where he sells for an undisclosed principal;³ to act in accordance with the usage, and the rules and regulations of the market in which he deals, except so far as the usage, rules or regulations are unreasonable or alter the intrinsic nature of the contract of agency.⁴ A usage which, by converting the broker into a principal, changes the intrinsic nature of the contract of agency is regarded as unreasonable.⁵ A broker has also implied authority to close his account with the principal, but not to close part of it only, if the principal fails to duly pay the differences.⁶ Where he is authorised not only to negotiate a contract but also to enter into a binding contract on behalf of his principal he has implied authority to sign such contract;⁷ but ordinarily his authority ceases when he has brought together the parties to a consensus.⁸

(a) Authority
of broker

A broker has no implied authority to contract in his own name,⁹ to cancel,¹⁰ or vary¹¹ contracts made by him; to receive payment for an undisclosed principal otherwise than in accordance with the terms of the original contract, or to receive payment by way of set off;¹² to receive payment of the price of goods sold on behalf of a disclosed principal;¹³ to delegate his authority, whether acting under a *del credere* commission or not,¹⁴ to pledge bills intrusted to him to get discounted;¹⁵ in the absence of a particular custom sanctioning such a pledge;¹⁶ and to sell stock or shares on credit even if he considers it for the principal's benefit.¹⁷

¹ *Ferguson v. Um Chand Roid*, (1905) 33 Cal. 343.

² *Boorman v. Broson*, (1842), 3 Q. B. 511; *Wiltshire v. Sims* (1908), 1 Camp. 258.

³ *Campbell v. Hassel* (1816), 1 Stark. 233.

⁴ *Crupper v. Cook* (1868) L. R. 3 C. P. 194; *Robinson v. Mollett* (1874) L. R. 7 H. L. 802. *Sutton v. Tatham* (1839) 10 A. & E. 27=50 R. R. 312.

⁵ *Robinson v. Mollett* (1874) L. R. 7 H. L. 802.

⁶ *Pearson v. Scott*, 9 Ch. D. 198; *Blackburn v. Mason* 68 L. T. 510 C. A.;

Anderson v. Sutherland, 13 T. L. R. 163.

⁷ *Mechem*, §. 2396.

⁸ *Ibid.* See also *Durga Chandra Mitra v. Rajindra Narayan Sinha*, 1923 Cal. 57.

⁹ *Baring v. Currie* (1818), 2 B. & A. 137.

¹⁰ *Xenos v. Wickham* (1866) L. R. 2 H. L. 306

¹¹ *Blackburn v. Scholes* (1810) 2 Camp. 343=11 R. B. 723.

¹² *Campbell v. Hassel* (1816) 1 Stark. 735; *Pearson v. Scott* (1878), 9 Ch. D. 198;

Atterall v. Hindle (1867) L. R. 2 C. P. 368.

¹³ *Law v. Jameson* (1886) 2 T. L. R. 206.

¹⁴ *Henderson v. Barnewell* (1827), 1 Y. & J. 387; *Lockart v. Islam* (1813), 2 M. & S. 301.

¹⁵ *Haynes v. Foster*, (1833) 3 L. J. Ex. 153.

¹⁶ *Foster & Pearson*, (1835), 1 C. M. & R. 849

¹⁷ *Wiltshire v. Sims* (1908), 1 Camp. 258.

Insurance broker.

A policy broker authorised to subscribe policies on behalf of an underwriter has implied authority to adjust a loss arising under a policy¹ and to refer a dispute about such a loss to arbitration.² But he has no implied authority to pay total or partial losses on behalf of the underwriter.³ Nor has a policy broker implied authority to cancel contracts made by him;⁴ or to receive payment from underwriters of a sum due under a policy by bill of exchange,⁵ or by way of set-off, even if there is a custom by which a set-off is considered equivalent to payment as between brokers and underwriters, unless the principal had notice of the custom and agreed to be bound by it at the time when he authorised the broker to receive payment.⁶

Shipbroker.

The mere employment of ship's brokers at a foreign port to find a cargo for a ship and adjust the terms upon which it is to be carried, does not give them implied power to relieve the master, when he signs the bill of lading presented to him, from the duty of seeing that the dates of shipment are correctly stated in the bill of lading.⁷

(b) Authority of auctioneer.

An auctioneer has implied authority to sign a contract on behalf of both buyer and seller.⁸ an authority which does not, however, extend to his clerk;⁹ unless the purchaser has specially, either by words or by conduct, authorised the clerk to act as his agent for this purpose.¹⁰ The implied authority of an auctioneer to sign on behalf of the buyer does not, however, extend to a sale of unsold lots by private contract subsequently to the sale by auction.¹¹

An auctioneer has no implied authority as such, to rescind a sale made by him;¹² to warrant goods sold by him;¹³ and if he does so, he is personally liable to the vendee for the breach of such warranty; and to take a bill of exchange in payment of the deposit, or of the price of goods sold, though it is provided by the conditions of sale that the price shall be paid to him;¹⁴ but he may take a cheque in payment of the deposit according to the usual custom.¹⁵ Nor has an auctioneer implied authority to sign the vendor's name to any contract except the contract

1. *Richardson v. Anderson* (1805) 1 Camp. 43 n=10 R. R. 628 n

2. *Goodson v. Brooke* (1815) 4 Camp. 163.

3. *Bell v. Auldjo* (1784) 4 Doug. 48.

4. *Xenos v. Wickham*, *supra*

5. *Hine v. SS. Insurance Syndicate* (1895) 72 L. T. 79.

6. *Sweeting v. Pearce* (1859) 7 C. B. N. 8 449=121 R. R. 584, *Bartlett v. Pentland* (1830) 10 B. & C. 760; *Scott v. Irving*, (1830) 1 B. & Ad. 605=35 R. R. 396.

7. *Stunore v. Breen*, L. R. 12 App. Cas. 698.

8. *Emerson v. Heelis* (1809) 2 Taunt. 38=11 R. R. 520; *White v. Proctor* (1811) 4 Taunt. 209=13 R. R. 580. But see *Bartlett v. Purnell* (1836) 4 A. & E. 792=43 R. R. 484.

9. *Bell v. Balls* (1897) 1 Ch. 663 Cp. *Sims v. Landray* (1894) 2 Ch. 318.

10. *Hird v. Boulter* 4 B. & A. 443; *Sims v. Landray* (1894) 2 Ch. 318.

11. *Mewes v. Carr* (1856) 1 H. & N. 484=108 R. R. 683.

12. *Nelson v. Aldridge*, (1818), 2 Stark. 435.

13. *Payne v. Leconfield* (1002), 51 L. J. Q. B. 642.

14. *Williams v. Evans*, (1886) L. R. 1 Q. B. 352. *Sykes v. Gills* (1839) 5 M. & W. 645.

15. *Farrer v. Lacy* (1885) 31 Ch. D. 42.

of sale¹; or to deliver goods sold without payment, or to allow a set-off due from the vendor to the purchaser.² Authority to sell by auction does not imply an authority to sell by private contract, in the event of the public sale proving abortive, though the auctioneer may be offered a price in excess of the reserve.³ An auctioneer also has no implied authority to deal, after sale, with the terms on which a title shall be made.⁴ He is an agent for sale only.⁴

The implied authority of the auctioneer, apart from express instructions enlarging or limiting it, is a general authority to sell,⁵ and extends to selling and dealing with the subject matter of the sale in the way usual and customary amongst auctioneers.⁶ The authority does not extend so as to make the vendor liable for injury caused by the auctioneer's negligence to person attending the sale unless the vendor has instructed auctioneer to do any unlawful act or thing whereby the injury was caused.⁷ The authority of the auctioneer is personal and cannot be delegated.⁸

An auctioneer has also implied authority to receive the deposit on sales both of lands and goods,⁹ and to receive the purchase-money on sales of goods,¹⁰ but not on sales of land,¹¹ but this implied agency may be excluded by the express terms of conditions of sale.¹² The auctioneer has authority to receive payment of the deposit by cheque¹³ but cannot be compelled so to do.¹⁴ His authority to receive payment of deposit by cheque is confined to cheques which are payable at sight and does not extend to post-dated cheques or bills of exchange.¹⁵

The auctioneer has, however, no right in the absence of express instructions to take payment of the purchase-money otherwise than in cash.¹⁶ In cases where the auctioneer has received payment by cheque or bill of exchange without or in excess of any authority, express or implied, the vendor is not bound by such payment. The purchaser still remains liable,¹⁷

- 1 *Megan v. Molloy* (1878), L. R. 2 Ir. 530. See also *Van Praagh v. Eneridge*, (1903) 1 Ch. 434.
- 2 *Brown v. Staton* (1816), 2 Chit. 353.
- 3 *Daniel v. Adams* (1764) Amb. 495; *Marsh v. Jelf*, (1862) 3 F. & F. 234. An agent abroad, instructed to buy goods at an auction has authority to buy by private contract before the auction at less than the price limited by his instructions, *Stein v. Cope* (1883) Cab. & El. 63.
- 4 *Ston v. Slade* (1802), 7 Ves. 265, 276.
- 5 *Howard v. Braithwaite* (1812), 1 Ves. & B. at p. 210.
- 6 *Collen v. Gardner* (1856), 21 Beav. 540.
- 7 *Walker v. Crabb*, (1916), 33 T. L. R. 119; See Halsbury, Vol. 1 [2nd Edn.] Article 1143, p. 697.
- 8 *Cole v. Trecothick*, (1804), 9 Ves. 234.
- 9 *Sykes v. Gibs* (1839), 5 M. & W. 645.
- 10 *Williams v. Millington*, (1798), 1 H. Bl. 81.
- 11 *Mynn v. Jolliffe* (1834), 1 Mood. & R. 326.
- 12 *Sykes v. Giles*, *supra*.
- 13 *Farrer v. Lacy Hartland & Co.* (1885), 31 Ch. D. 42, C. A.
- 14 *Johnson v. Boyes*, (1899) 2 Ch. 73.
- 15 *Williams v. Evans* (1866), L. R. 1 Q. B. 352; *Pape v. Westcott* (1894) 1 Q. B. 272 C. A.
- 16 *Ferrera (Earl) v. Robins* (1835), 2 Cr. M. & R. 152; *Sykes v. Giles*, *supra*.
- 17 See *Hodgens v. Kson*, (1894) 2 Ir. R. 657; and *Boothman v. Byrne* (1929), 57 Ir. L. T. 36.

and the auctioneer may be sued by the vendor for any damages sustained by him ¹

Where a reserve has been fixed by the vendor, there is no implied authority to sell without reserve even though the auctioneer has ostensibly so sold; and if, in breach of his instructions, the auctioneer sells without reserve a sale below the reserve price will not give the purchaser any right to enforce the contract against the vendor ²

An auctioneer cannot conclude a sale by private contract,³ although if the vendor accept a purchaser introduced by the auctioneer and himself conclude a sale to such purchaser by private treaty, the auctioneer has a right to claim remuneration ⁴ In some cases, where property has been bought in, and immediately afterwards the auctioneer has sold the property at the reserve price to a person present at the biddings, this sale has been held good as in effect a sale by auction,⁵

An auctioneer may sell property of his own as principal and need not disclose the fact that he is so selling⁶ but where selling as agent, he is the agent of the vendor only, except for the purpose of signing the contract or a memorandum of the contract for which purpose he is also the agent of the vendee ⁷ If the auctioneer is himself the vendor he cannot sign as the agent of the purchaser ⁸

(c) Authority
of factors

Factors are agents who are put in possession of goods or the documents of title to them and are employed to sell or purchase them on commission but not to barter them ⁹ Where, for an extra commission, they guarantee the payment by the purchaser, they act under a *del credere* commission Factors as distinguished from brokers buy and sell in their own names, and are entrusted with the possession management, and control of goods, and can therefore sue and be sued ¹⁰

Where goods are entrusted to a factor for sale, he has implied authority to sell them in his own name ¹¹ at such times and for such prices as he thinks best¹² on reasonable credit,¹³

1 *Leaves [Earl] v Rolins* supra See Halsbury Vol I [2nd Edn], Article 1145 p 697

2 Halsbury Vol I [2nd Edn] Article 1144 p 697 citing *McManus v Fortescue* (1907) 2 K B 1 (A disapproving on this point *Rainbow v Houkins* (1904) 2 K B 322 If however the vendors instructions are to carry out a sale subject to a secret reserve and so to act as agent in effecting a fraud the auctioneer will not be liable to the vendor for disregarding such instructions *Beruell v Christie* (1761) 1 Cowp 395

3 *Marsh v Jelf* (1862) 3 F & F 234

4 *Green v Bartlett* (1873) 14 C B (N S) 681

5 *Elze v Barnard Ex parte Courtauld* (1860) 29 L J (Ch) 729, *Bousfield v Hodges* (1863) 33 Bear 90 See Halsbury Vol I [2nd Edn] Article 1148 page 698

6 *Flint v Woodin* 9 Hare 618

7 *Emerson v Heelis* 2 Taunt 38, *White v Proctor* 4 Taunt 209, See Halsbury Vol I [2nd Edn], Article 1143, p 696

8 *Buckmaster v Harrop*, 7 Ves 341, *Wright v Dannah*, 2 Camp 203

9 *Guerreiro v Peile* (1820) 3 B & Ald 616

10 *Buving v Corrie* (1818) 2 B & Ald 148, *Johnson v Osborne* (1841) 11 Ad & E 549 See also notes on pages 44 & 48

11 *Baring v Corrie* supra, *Ex p Dixon re Henley* (1876) 4 Ch D 183

12 *Smart v Sanders* (1846), 17 L J C P 258=77 R R 849

13 *Houghton v Matthews* (1808), 3 B & P 485, *Scott v Surman* (1742), Willes 400

and to warrant quality or title of the goods sold if it is usual to warrant that class of goods.¹ He has also implied authority to receive payment of the price, if he sells in his own name. The purchaser of goods from a factor has a right to pay him in money and be discharged.²

A factor has no implied authority, as such, to delegate his authority, whether acting under a *del credere* commission or not,³ as a factor is an agent employed out of reliance in his personal skill and integrity. He has also no implied authority to barter⁴ or pledge goods,⁵ or the bill of lading for goods,⁶ entrusted to him for sale. Even if he has accepted bills drawn by the principal to be provided for out of the proceeds of the goods, he has no implied authority to raise money by pledging the goods for the purpose of meeting the bills.⁷

A factor has no implied authority to compromise or compound the claim for the purchase price,⁸ or to submit a dispute arising as regards any transaction to arbitration⁹ or to rescind a sale already completed or discharge the purchaser from its obligation¹⁰ unless the transaction stands in his own name and rescission is effected before the principal is disclosed.¹¹

Having sold on credit a factor has ordinarily no implied authority to extend time of payment,¹² or to receive anything but money in payment.¹³ He has no implied authority to bind his principal by making, accepting or indorsing a negotiable instrument.¹⁴ He cannot sell the goods to himself without knowledge and consent of the principal,¹⁵ and if he does so the principal may repudiate the transaction.¹⁶

Factors have an insurable interest in the goods confined to them, and they can get them insured in their own name to the extent of the full value thereof and can recover in respect of an insurance effected by them.¹⁶ But unless there are instructions of his principal to that effect, or unless the usage of the trade or a habitual course of dealing between him and his principal imposes on him duty to do so, he is not bound to insure.¹⁷

¹ *Dingle v. Hare* (1859), 7 C. B. [N. S.] 145.

² *Drinkwater v. Goodwin* (1775), Cowp. 251.

³ *Cockran v. Irlam* (1813), 2 M. & S. 301=15 R. R. 257, *Solly v. Rathbone* (1814), 2 M. & S. 298.

⁴ *Guezeiro v. Peile* (1820), 3 B. & A. 616=22 R. R. 500.

⁵ *Martins v. Coles*, (1813) 1 M. & S. 140; *Paterson v. Tash* (1743), 2 Str. 1178, *Gauchard v. Morgan*, (1819) 4 Moo. 36.

⁶ *Newson v. Thornthou* (1805), 6 East 17=8 R. R. 378.

⁷ *Gill v. Kymer* (1821), 5 Moore 503; *Friedling v. Kymer* (1821), 2 B. & B. 639.

⁸ See Russell on Mercantile Agency [2nd Edn.], 48.

⁹ See *Garnochan v. Gould*, 19 Am. Dec. 668.

¹⁰ *Smith v. Rice*, 1 Bailey (S. C.) 648.

¹¹ *Mecham*, S. 2081.

¹² *Douglas v. Bernard*, Anthon's N. P. [N. Y.] 278.

¹³ *Underwood v. Nicholls*, 17 C. B. 239; *Sangston v. Maitland*, 11 G. & S. [Md.] 286; *Guy v. Oakley*, 13 Johns [N. Y.] 332.

¹⁴ *Hugg v. Snaith*, 1 Taunt. 347; *Murray v. East India Co.*, 5 B. & A. 204.

¹⁵ *Sims v. Miller*, 37 S. Car. 402.

¹⁶ *Waters v. Monarch Life Ass.* (1848), 5 El. & Bl. 870 *Crawford v. Hunter* (1798), 8 T. Rep. 13 at p. 25; *Brisban v. Boyd*, 4 Paige [N. Y.] 17.

¹⁷ *Lucena v. Crawford*, 2 B. & P. N. R. 268. For other authorities see Estlin, p. 712.

Limitations imposed by the principal would ordinarily be binding upon the factor,¹ but not upon persons dealing with him unless they had or could be charged with notice thereof.²

A factor may, if he buys goods for money and on his own credit, exercise the right of stoppage in transit.³

Although a factor has no power to delegate his authority to another he can do so in certain very exceptional circumstances where such power is necessarily implied in the contract of agency itself.⁴

As to the rights of third persons dealing with him in good faith, see *infra*.

(d) Authority
of ship-
master.

The extent of a shipmaster's authority to bind his principals personally by contract, or to sell or hypothecate the ship or cargo, or freight, is determined by the law of the country to which the ship belongs,¹ and the ship's flag operates as notice to all the world that the master's authority is limited by the law of that flag.⁵ Thus, if the master of an Italian ship give a bond hypothecating an English cargo under circumstances which according to English law do not justify the hypothecation, the bond will be held valid and will be enforced by the English courts.⁶

A shipmaster is appointed for the purpose of conducting the voyage on which the ship is engaged to a favourable termination, and has implied authority to do all things necessary for the due and proper prosecution of that voyage.⁷ He has also implied authority to enter into contracts in respect of the usual employment of the ship.⁸ Thus, a master may make a charter, in his own name so as to bind his owners, if this is done at a foreign port and there is a difficulty in communicating with his owners, and it is made in the usual course of the ship's employment, and in circumstances which do not afford evidence of fraud, or if it is made at the ship's home port in the circumstances which afford evidence of the assent of the owners,⁹ provided that, in making a contract for the hire of the ship he does not substitute it for a contract already made by his

1. *Bliss v. Arnold*, 8 Vt. 252; *Hull v. Storrs*, 7 Wis. 253; *Barksdale v. Brown* 9 Am. Dec. 720.

2. *Mochon*, 8 2504; Bowstead, Articles 87 to 89, pages 216 to 222

3. *Fesse v. Wray*, 3 East 93

4. As for instance, where the employment of a sub-agent is justified by the usage of the trade, *Trieman v. Loder*, 11 A. & E. 589; *Warner v. Martin*, 11 How. [H. 8.] 209 or by an established course of dealing [*Riose v. Sutton*, 3 Mcriv. 237; *Warner v. Martin*, *supra*; *Combe's cases*, 9 Cnko 75] or where it is required by the necessities of the transaction *McMorris v. Simpson*, 21 Wend [N. Y.] 610; *Johnson v. Cunningham*, 1 Ala. 249; *Dorchester, etc. Bank v. New England Bank*, 1 Cush. [Mass.] 117; *Planters etc. Bank v. First National Bank*, 75 N. C. 534; See *Katiar*, p. 711.

5. *The Kornak* (1869), L. R. 2 P. C. 505; *The Gaetano and Maria* (1882) 7 P. D. 137; *The August*, (1891) P. 238; *Lloyd v. Gubert* (1865), 33 L. J. Q. B. 241

6. *The Gaetano and Maria* (1882), 7 P. D. 137

7. *Arthur v. Barton* (1840) 6 M. & W. 138=55 R. R. 542; *Beldon v. Campbell* (1851), 6 Ex. 886. Whether he has implied authority to make an agreement binding his owners to arbitration *quaere*; *The City of Calcutta* (1899) 79 L. T. 517, C. A. See Bowstead, p. 78, f. n. (c).

8. *Grant v. Norrway* (1851), 20 L. J. C. P. 93=84 R. R. 747; *McLean v. Fleming* (1871), 2 H. L. Sc. App. 128.

9. *Messageries Impériales Co. v. Baines*, 1 Mar. L. C. 285.

owners. But he can only bind personally those persons who appointed him or were privy to his appointment. The mere fact that a person is a registered owner of the vessel is not sufficient to render him liable on the master's contracts; it must appear that the master is, or has been held out as, his agent.¹ Thus, if the ship is chartered, and the possession and control thereof given up to the charterers, who appoint the master, the owners are not liable on a bill of lading or other contract entered into by the master.² The same principle applies if the vessel is chartered, and the possession and control given up, to the master himself.³

The master of a British ship has thus implied authority to contract for the conveyance of merchandise according to the usual employment of the ship,⁴ to enter into a charter party on behalf of the owners, when he is in a foreign port and there is difficulty in communicating with the owners,⁵ to render salvage services to vessels in distress,⁶ to enter into reasonable towage agreements⁷ and to enter into reasonable salvage agreements if necessary for the owner's benefit; but not merely for the purpose of saving the lives of the master and crew without regard to saving the owner's property. A salvage agreement operates as a charge on the property saved, and is only binding to the extent of the value of that property.⁸

The master has implied authority to procure all "necessary supplies" for the ship i. e., such things as are fit and proper for the ship upon the voyage.⁹ He may pledge his principal's credit, at home or abroad, for necessary repairs or stores necessary for the equipment of the vessel on her voyage, such as a prudent owner would himself order,¹⁰ where it is reasonably necessary, under the circumstances of the case, to obtain them on credit.¹¹ He may also borrow money on the credit of his principal at home or abroad, if the advance is necessary for the

1 *Mackenzie v. Pooley* (1856), 11 Ex. 638—105 R. R. 698; *Mitcheson v. Oliver* (1855), 5 E. & B. 419, Ex. Ch., *Myers v. Willis* (1850), 25 L. J. C. P. 255, *Baker v. Buckle* (1822), 7 Moo. 349;

2 *Baunwell Manufactur v. Furness* (1893) A. C. 8

3 *Frazer v. Marsh*, (1811), 13 East 238; *Rice v. Davis* (1834), 1 A. & E. 312; *Colvin v. Neuberry* (1832), 1 C. & F. 283. *Comp. Steel v. Lester* (1877), 3 C. P. D. 121; *Associated Portland Cement Manufacturers v. Ashton*, (1915) 2 K. B. 1; *See. Bowstead*, pp. 78, 79.

4 *Kunquist v. Ditchell* (1801), 3 Esp. 64.

5 *The Fanny, The Mathilda* (1883), 5 Asp. M. C. 75; *Grant v. Noricay* (1851), 10 C. B. 665.

6 *The Thetis* (1869) L. R. 2 Ad. 365.

7 *Wellfield v. Adamson* [The Altred] (1884), 5 Asp. M. C. 214, *The Arthur* (1862), 6 L. T. 556.

8 *The Benpor* (1883), 9 P. D. 115; *The Mariposa*, (1896), p. 273; *The Inchmuree* (1899), p. 111. The Court will not enforce unreasonable or inequitable contracts for salvage or towage services; *The Medina* (1876), 2 P. D. 5 C. A.; *The Silenia* (1880), 5 P. D. 177; *The Crusader*, (1907), P. 196, C. A.

9 *Webster v. Seekamp*, 4 B. & Ad. 352; *The Sophia* 1 W. Rob., 368; *The Alexander*, 1 Dodson, 278, 1 W. Rob., 346. *The Riga*, L. R. 3 A. & E., 516.

10 *Frost v. Oliver* (1853), 1 C. L. R. 1003; *Webster v. Seekamp*, *supra*; *The Riga*, *supra*.

11 *Gunn v. Roberts* (1874) L. R. 9 C. P. 331; *Edwards v. Havill* (1859), 23 L. J. C. P. 8; *Mackintosh v. Mitcheson* (1849), 4 Ex. 175; *Pocahontas Fuel Co. v. Ambatielos* (1922), 27 Com. Cas. 148.

prosecution of the voyage, communication with the principals is impracticable, and they have no solvent agent on the spot.¹

To render the principals liable for such an advance, the lender must prove—(1) that there was a reasonable necessity, according to the ordinary course of prudent conduct, to borrow on their credit (this is a question of fact); (2) that the amount was advanced expressly for the use of the ship; and (3) that the money was expended on the ship. There is no implied authority to pledge the credit of the principals when they can reasonably be communicated with, or for the purpose of paying for services already rendered, or when there is a solvent agent on the spot.² But the state of accounts between the master and his principals does not affect his implied authority to borrow on their credit.³

The master of a British ship has also implied authority to give bottomry bonds, hypothecating ship, freight, and cargo, for necessary supplies or repairs in order to prosecute the voyage, when it is not possible to obtain them on personal credit, and communication with the respective owners is impracticable.⁴ But there is no implied authority to hypothecate either ship or cargo for necessities already supplied,⁵ or for the purpose of obtaining personal freedom from arrest,⁶ in any other way. Where ship and cargo are hypothecated for repairs, the ship owners are bound to indemnify the owners of the cargo from liability under the bond.⁷ The cargo alone may be hypothecated (*respondentia*) if necessary for the benefit of the cargo, or for the prosecution of the voyage, but the owners must in all cases be first communicated with if possible.⁸ The master has no implied authority to hypothecate or do any act seriously affecting the value of the cargo without first communicating, if practicable, with the owners thereof.

The master has also implied authority to sell the ship, in the case of absolute or urgent necessity, as where in consequence of damage it is impossible to continue voyage, and the ship cannot be repaired except at such a cost as no prudent owner would incur.⁹ But to justify a sale, the necessity must be such as to leave no other alternative and communication with the

1. *Rocher v. Busker* (1815), 1 Stalk. 27=18 R R 742; *Arthur v. Barton*, (1840) 6 M. & W. 138; *Stonehewer v. Gent* (1841) 2 Q. B. 431; *Beldon v. Campbell* (1851), 6 Ex 886; *Johns v. Simons*, (1892) 2 Q. B. 425; *Edwards v. Hamill*, (1853), 14 C. B. 107; *Robinson v. Lyall*, (1819), 7 price 592.
2. Bowstead, p. 80 and authorities cited therein.
3. *Williamson v. Page* (1844), 1 C. & K. 581.
4. *Kleinwort v. Cusca Marittima De Genoa* (1877) 2 App. Cas. 156; *The Staffordshire* (1872) L. R. 4 P. C. 194; *Hussey v. Christie* (1807) 13 Ves. 599=9 R R 585; *Stainbank v. Shepard* (1853), 13 C. B. 418=93 R R. 509.
5. *The Hersey* (1837), 3 Hagg. Ad 404; *Hussey v. Christie*, supra; *The Ida*, supra; *The Faithful*, (1842), 31 L. J. Ad. 81; *Heathorn v. Darling*, (1836), 1 Moo P. C. 5.
6. *Smith v. Gould* (1842), 4 Moo P. C. C. 21, P. C.
7. *Duncan v. Benson*, 1 Ex. 537; affirmed in (1849), 3 Ex. 644.
8. *The Sultan* (1859) 8 W. 504; *The Onward* (1873) L. R. 4 Ad. 38; *The Hamburg*, (1863) 2 Moo. P. C. [N. S.] 289=41 R. R. 77. *The Gratitude* (1801) 3 Rob. 240.
9. *The Australia* (1859) 13 Moo. P. C. 132; *Robertson v. Clarke* (1824), 1 Bing 445=25 R. R. 676; *Ireland v. Thomson* (1847) 4 C. B. 149=72 R. R. 560.

owner must be impracticable.¹ The burden of proving necessity lies on the party seeking to uphold the sale. It must be such a stringent necessity as leaves the master no alternative as a prudent and skilful man, acting in good faith for the best interests of all concerned and with the best judgment that can be formed under the circumstances except to sell the ship as she lies. If he sells hastily, either without sufficient examination into the condition of the ship or without having previously made every exertion in his power with the means then at his disposal to extricate her, the sale is invalid, even if the danger at the time appeared exceedingly imminent.² But if in consequence of damage it is impossible to prosecute the voyage, or there is no prospect of completing it,³ or if the ship is in foreign port, and cannot be repaired except at such a cost as no prudent person would venture to incur, the master has implied authority to sell her.⁴

Where repairs are absolutely necessary in order to prosecute the voyage and communication with the owners of the cargo is impracticable, the master has implied authority to sell a portion of the cargo to enable him to continue the voyage.⁵ But his authority as agent of the owners of cargo is strictly one of necessity⁷ and he is not justified in selling any portion thereof until he has done everything in his power to carry it to its destination.⁶ In no case has he implied authority to stop the voyage and sell the whole of the cargo in a foreign port, even if a continuation of the voyage is impossible and to sell appears to the best course to take in the owner's interest under the circumstances.⁷ Modern facilities of communication however tend to make obsolete earlier authorities on this branch of law.⁸

The master of a British ship has no implied authority to vary any contract made by the owners,⁹ to agree for the substitution of another voyage in place of that agreed upon between the owners and freighters or make any contract outside the scope of that voyage,¹⁰ to hold out any person as an agent to charter the vessel,¹¹ to sign the bill of lading at a lower freight than the owner contracted for,¹² or making the freight payable

1. *Cobeguid Marine Insurance Co. v. Barteaux* (1875) L. R. 6 P. C. 319; *The Bonita* (1861) 30 L. J. Ad. 145.

2. *Cobeguid Marine Insurance Co. v. Barteaux* (1875) L. R. 6 P. C. 319.

3. *Ireland v. Thomson* (1847), 17 L. J. C. P. 241; *Hunter v. Parker* (1840) 7 M. & W. 322.

4. *The Australia* (1859), 13 Moo. P. C. C. 132, P. C.; *Idle v. Royal Exchange Assurance Co.* (1819), 3 Moo. 115.

5. *Australasian Steam Navigation Co. v. Morse* (1872) L. R. 4 P. C. 222; *Benson v. Duncan*, (1849), 3 Ex. 644 Ex. Ch; *The Gratitude* (1801) 3 Rob. 240.

6. *Gibbs v. Grey* [1857] 2 H. & N. 22=115 R. R. 408; *Freeman v. East India Co.* [1822] 5 B. & Ald. 617=24 R. R. 497.

7. *Atlantic Mutual Insurance Co. v. Huth* [1879] 16 Ch. D. 474, *Wilson v. Milar* [1816] 2 Stark. 1; *Acatos v. Burns* [1878] 3 Ex. 282; *Van Omeron Dowick* [1809], 2 Camp. 42=11 R. R. 656.

8. *Pollock & Mulla*, p. 545.

9. *Grant v. Norway* [1851], 10 C. B. 665; *Pearson v. Goschen* [1864], 33 L. J. C. P. 265.

10. *Burton v. Sharpe* [1810], 2 Camp. 529.

11. *The Fanny, The Mathilda* [1883], 5 Asp. M. C. 75.

12. *Pickernell v. Jauberry*, [1862] 3 F. & F. 217.

to any person other than the owner.¹ His authority to sign bills of lading is limited to signing for goods actually received on board,² and all persons taking a bill of lading, by indorsement or otherwise are deemed to have notice that his authority is so limited.³

The term 'necessaries' includes anchors, cables, rigging, and matters of that description,⁴ coals,⁵ provisions and clothing for the crew,⁶ copper sheathing,⁷ screw propeller,⁸ money advanced to pay for necessities,⁹ or to pay a shipwright's lien,¹⁰ towage and dock dues,¹¹ and insurance on freight,¹² and such repairs and other things as the owner as a prudent man would have ordered if he had been present at the time.¹³ Though the supplies come within the category of necessary things for a ship, yet a person who supplies them must show that they were necessary for the ship at the time, and if it is provided that there were other things of the same description on board, he must prove that they were not sufficient.¹⁴

(c) Legal Practitioners.

The relationship between counsel and his client is not that of agent and principal. The duty of counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn and this withdrawal is made known to the other side, he has, with regard to all matters that properly relate to the conduct of the case unlimited power to do that which is best for his client *e. g.* he can assent to a compromise upon certain conditions and terms.¹⁵ "Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party."¹⁶

1. *Reynolds v. Jer* [1865], 34 L. J. Q. B. 241.
2. *Cor v. Bruce* [1886] 18 Q. B. D. 147; *Hubbersty v. Ward* [1853] 8 Ex. 330—91 R. 519. The master's signature is *prime facie* evidence against the owners that the goods signed for were put on board, but it is not conclusive against them. *Brown v. Powell Duffryn Coal Co.* [1875] L. R. 10 C. P. 562; *Smith v. Bedouin Steam Navigation Co.*, [1896] A. C. 70, unless there is an agreement that the bill of lading shall be conclusive evidence against the owners as to the quantity shipped. *Lushman v. Christie* [1887] 19 Q. B. D. 333.
3. See Bowstead, p. 82.
4. *The Alexander*, 1 Wm. Rob. 340.
5. *The West Friedland*, 1859 Swa. 454; *The Comtesse de Frequeville*, 1861 Lush. 329; *The Mecca*.
6. *The N. R. Gorfabrick*, 1858 Swa. 344; *The William F. Safford*, 1860 Lush. 69.
7. *The Perla*, 1858 Swa. 363; *The Turluani*, 2 App. M. C. 603.
8. *The Flecha*, 1 E. & A. 438 [441].
9. *Arthur v. Hurton* 6 M. & W. 138 [144]; *The Sophie*, 1 Wm. Rob. 368; *The Albert Crosby*, 3 A. & E. 37.
10. *The Albert Crosby*, *supra*.
11. *The St. Lawrence*, 5 P. D. 250.
12. *The Riga*, 3 A. & E. 516.
13. *Ibid.*
14. Halsbury. Vol. XXVI [1st Edn.], Art. 124; *The Alexander*, *supra*; see Katlar, p. 768.
15. *Per Lord Esher M. R.* in *Matthews v. Munster* [1887] 20 Q. B. D. 141, 142.
16. *Per Bowen L. J.* 20 Q. B. D. 141, at p. 144; *Jang Bahadur v. Shanker Rai* [1890] 13 All. 272; *Nundo Lal v. Nistarini* [1900] 27 Cal. 428; *Jagannath Das v. Ram Das* [1870] 7 B. H. C. O. C. 79. See *Carrierson v. Rodrigues*, 1886] 13 Cal. 115, where the Court set aside a compromise made by counsel for the plaintiff against her express prohibition, the consent decree not having been sealed, and the plaintiff having notified her dissent before the decree was drawn up.

Under the English law¹ it has been held that where counsel is employed to conduct a case, he has implied authority, subject to any express instructions to the contrary² —

1. To consent to a non-suit,³ or to the withdrawal of a juror.⁴

2. To compromise or abandon the claims of his client, or give an undertaking on his behalf, in respect of all matters within the scope of the suit or matter,⁵ but not in respect of anything beyond the scope thereof.⁶

3. To enter into an agreement with the counsel on the other side as to the subject-matter of the suit or matter, or as to costs,⁷ but not as to anything beyond the scope of the suit or matter.⁸

4. To consent to an order.⁹

5. Generally, to do all other things appertaining to the conduct of the case according to his absolute discretion.¹⁰

In India also a counsel has the same implied authority to compromise an action as a counsel in England. But this authority may be withdrawn or limited by the client, in which case it is destroyed or restricted.¹¹ This authority does not extend to a compromise of matters outside the scope of the particular case in which he is retained,¹² nor to referring the case itself to arbitration on terms different from those which the client has authorised. If he does so the settlement may be set aside.¹³

In *Askaran v. E. I. Rly.*¹⁴, the Calcutta High Court pointed out that an advocate (whether a counsel, a vakil, or attorney) has authority to compromise a suit if he assents to the arrangement in court but his client is not bound by the act or admission of the advocate out of court unless it is in fact authorised by the client or ratified by him. But this distinction has not been adopted in subsequent cases in which the whole subject has

1 See Bowstead, p. 77 and authorities cited therein.

2 See *Neale v. Gordon Lennar* [1902] A. C. 465; *Leus v. Leus* [1890], 45 Ch. D. 281; *Shepherd v. Robinson*, [1919] 1 K. B. 474.

3 *Lynch v. Coel* [1865], 12 L. T. 548.

4 *Strauss v. Francis* [1886], L. R. 1 Q. B. 379.

5 *Re Wood, Ex p. Wenham* [1872], 21 W. R. 104; *Chambers v. Merson* [1858], 28 L. J. C. P. 10; *Hargrave v. Hargrave* [1850], 19 L. J. Ch. 261; *Matthews v. Munster* [1887], 20 Q. B. D. 141.

6 *Ellender v. Wood* [1888], 4 T. L. R. 680, C. A.

7 *Strauss v. Francis*, *supra*; *Sumfen v. Sumfen*, [1858], 27 L. J. Ch. 35; *Re West Devon Mine*, [1888], 38 Ch. D. 51.

8 *Kempshall v. Holland*, [1895], 14 R. 336, C. A.

9 *Mole v. Smith* [1820], 1 Jac. & Walk. 673; *Re Hobbs* [1844], 8 Beav. 101; *Furnival v. Bogle*, [1827], 4 Russ. 142.

10 *Strauss v. Francis*, *supra*; *Lynch v. Coel*, [1865] 12 L. T. 548.

11 *Sheomandan v. Abdul*, 39 C. W. N. 1185 P. C.

12 *Nundo Lal v. Nisturini*, [1900] 27 Cal. 428; *Johurmull Bhutra v. Kedar Nath Bhutra*, 1927 Cal. 714=55 Cal. 113=1041. C. 387.

13. *Neale v. Gordon Lennar* [1902] A. C. 465; *Chuni Lal Mandal v. Hara Lal Mandal* [1927] 32 C. W. N. 44=106 I. C. 309.

14 52 Cal. 386=1925 Cal. 696=88 I. C. 413=29 C. W. N. 566.

been reviewed and it has been held that the authority of a counsel to compromise is implied and inherent in his position.¹

No power of attorney is necessary to empower a counsel to agree to a valid and binding compromise.² Where the compromise extends to collateral matters, outside the scope of the particular case in which the counsel is engaged, in order to bind the client it must be shown that the counsel had a special authority to compromise. If counsel under a misapprehension of his client's instructions and believing himself to have authority acts in fact without it, he cannot bind his clients.³ A compromise of a case notwithstanding the express prohibition of the client was set aside.⁴ A counsel has otherwise implied authority to confess judgment, withdraw or compromise or refer to arbitration the suit in which he is instructed if his doing so is for the client's advantage or benefit even though he has no express authority from his client,⁵ and even though it had been effected contrary to the express instructions of the client unless the prohibition has previously been communicated to the other side.⁶ The advocates have no doubt ostensible authority to compromise a suit, but in cases where they took express instructions from their clients, and it was doubtful whether the clients appreciated that they consented to a compromise in the same sense in which it was appreciated by the advocates, it was held that it was open to the court to refuse its assistance for the purpose of implementing the compromise if in its discretion it thought it right and proper to do so.⁷

Unless the authority of a counsel is limited, a compromise entered into by him in the absence of the client and without his consent is binding on the client as a compromise within the apparent general authority of a counsel is binding on the client.⁸ A compromise made by a counsel duly authorized by *vakalatnama* to enter into a compromise on behalf of his client will be binding on the client even though the counsel acted under the instructions of a third person.⁹ Counsel has apparent authority to compromise in all matters connected with the action and not merely collateral to it; if he acts within his apparent authority and the other party has no notice of any limitation or restriction on that authority the client will be bound by the agreement made by his counsel. Before a consent order has been drawn up and perfected, the consent given by

1. *Johannmull v Kedarnath*, 35 Cal. 130. The fact that the counsels on either side have considered the matter outside the court room does not vitiate the consent made to the court in its presence, *Surendra v Tarubala*, 37 I. A. 133, authority of counsel to effect a compromise reviewed.
2. *Ramzan v. Gopal*, 1 I. R. 17 Lah. 456.
3. *Nando Lal v. Nistarini*, 27 Cal. 428, 438, 448; *Swinfen v. Swinfen*, I. C. B. N. S. 364, *reid. to*; *Muthiah v. Karuppan*, 50 Mad. 786, cited in *Bashiran v. Mohammad*, 33 A. L. J. 953; *Swinfen v. Chelmsford*, 5 H. & N. 890, 922.
4. *Carrison v. Rodrigues*, 1 L. R. 13 Cal. 115.
5. *Muthiah v. Karuppan*, 50 Mad. 786=105 I. C. 5=1927 Mad. 852.
6. *Askaran v. E. I. Rly.*, 52 Cal. 386; *Nando Lal v. Nistarini* 27 Cal. 428; see, however, *Muthiah Chetty v. Karuppan*, 50 Mad. 786, if a counsel is instructed not to do so without express authority from his client, he has no power to compromise, make admission in or refer to arbitration a suit.
7. *Ma Ahma v. Ma Khin*, 13 R. 319.
8. *Sen v. Chuni*, 83 I. C. 611.
9. *Payal v. Hara*, 108 I. C. 262.

the counsel or solicitor may be withdrawn by the client if the counsel or solicitor gave it under a misapprehension.¹ If a party is by the fraudulent action of his *vakeel* or other legal adviser committed to a compromise to which he did not wish to consent, his proper action is to get the decree set aside as having been obtained by fraud.²

The case of a pleader stands on a different footing, and he cannot enter into a compromise on behalf of his client without his express authority,³ nor can he apply for an order for referring a case to arbitration.⁴

An attorney is entitled in the exercise of his discretion to enter into a compromise, if he does so in a reasonable, skilful, and *bona fide* manner, provided that his client has given him no express directions to the contrary.⁵ In *Jagan Nathdass v. Ramdas*,⁶ the only Indian case on the subject, the court found that the client had authorised his attorney to compromise, and that the compromise was reasonable and proper.

It has been held that counsel's consent to a decree is without authority if it be given without consulting the client when the client is present in the court even though the counsel be unaware of the fact.⁷ When a consent decree is set aside on the ground that the decree was passed on a compromise in excess of the authority of the pleaders of the parties the effect is to revive the original suit.⁸

When a person engages an advocate or a *rakil* to conduct his case, it must follow that he authorises him to make binding admissions before the court, in course of his conduct of the case.⁹ But admissions in order to be binding must be within the scope of authority,¹⁰ and upon a question of fact within the scope of the suit.¹¹ And the greatest caution should be exercised by the Courts before acting upon the statements outside the ordinary scope of the *rakil's* authority in the particular matter for which he is employed.¹² Similarly, parties are bound by their counsel's admission unless he has been induced or misled by some circumstances to make the statement under mistake.¹³ So an admission by an attorney unless satisfactorily explained away furnishes cogent evidence against the client.¹⁴

Admission by
pleaders,
mukhtars,
and counsels

1. *Nilami v. Kedar*, 67 I. C. 96.
2. *Rama v. Rama*, 163 I. C. 161.
3. *Jagapati v. Ekambara*, 21 Mad. 274; *Venkataramana v. Charilla*, 6 M. H. C. R. 127; *Dighijoy v. Ata Rahman*, 17 C. W. N. 156; see also *Achampuranbath v. Gantz*, 3 Mad. 138; *Basangonda v. Churichirigonda*, 34 Bom. 408.
4. *Ram Juran v. Kali Churan*, 4 A. L. J. 342.
5. *Fray v. Foulce* (1859) 1 E. & E. 839=117 R. R. 483; *Prestwich v. Poley* (1865) 18 C. B. N. S. 806=144 R. R. 683 (authority of a managing clerk to compromise).
6. (1870) 7 B. H. C. O. C. 79.
7. *Ghani Ram v. Haribux*, 34 C. W. N. 210.
8. *Raj Kumar v. Hara Krishna*, 10 I. C. 355.
9. *Bhatnath v. Ram Lal*, 6 C. W. N. 82.
10. *Sita Ram v. Gaya*, A. I. R. 1923 Pat. 37.
11. *Dighijoy v. Ata Rahman*, 17 C. W. N. 156; *Bansilal v. Emp.*, 52 Bom. 686=112 I. C. 110=1928 Bom. 241.
12. *Jang Bahadur v. Shadkar Lal*, 13 All. 272, 276. F. B.
13. *Doddava Konu v. Yellava Konu*, 1922 Bom. 233=70 I. C. 417; *Venkata Narasimha v. Bhanyakarlu*, 29 I. A. 76=25 Mad. 367=6 C. W. N. 641.
14. *Ketokey v. Sarat Kumari*, 20 C. W. N. 995; *Chandra v. Naypat*, 34 I. A. 27.

But a party is not bound, generally speaking by a pleader's admission in an argument on what is a pure question of law amounting to no more than his view that the question is unarguable.¹ Similarly, an admission made by a counsel on a point of law cannot in any way bind the client.² Similarly, a wrong admission of a Mukhtar on a question of law would not be binding on the principal.³

Admissions in court by counsel on matters of fact relevant to the issue bind the client but not admissions on a question of law.⁴ Where counsel had given an undertaking that no appeal would be filed to the Privy Council an appeal in breach of the undertaking was declared to be not maintainable.⁵ If a client is in court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him and acquaint the other side with this, he must be taken to have agreed to the course proposed."⁶

(i) Other
professional
agents.

The same rule applies to other professional agents. Every such agent who is authorised to do any act in the course of his trade, profession, or business, as an agent, has implied authority to do whatever is usually incidental, in the ordinary course of such trade, profession or business, to the execution of his express authority, but not to do anything which is unusual in such trade, profession or business, or which is neither necessary for nor incidental to the execution of his express authority.⁷ In *Antisell v. Doyle*,⁸ an architect was employed to make plan for building certain houses. Having made the plans, he instructed a quantity surveyor to take out quantities, and then invited tenders, all of which exceeded the limits of the building owner's proposed expenditure. The quantity surveyor sued the building owner for his fees for taking out the quantities relying on an alleged custom in the building trade, by which the liability for such fees was thrown on the building owner in cases where no tender was accepted. The jury having found that there was no custom by which an architect was authorised to employ a surveyor without the sanction of the building owner, and the owner not having expressly authorised the employment, it was held that the defendant was not liable.

An estate agent is instructed to find a purchaser for certain property. He receives an offer, which he submits to his principal. The principal then instructs him to withdraw part of the property, and names the lowest price for the remainder. He has no implied authority to enter into a contract for the sale of the property, though the price is specified, because it is not

1. *Narayan v. Venkatcharya*, 28 Bom 408, *Kanhaya v. Shree Nath*, 1925 Oudh 665=87 I. C. 956, *Chandoo v. Murlidhar*, 1926 Oudh 311=92 I. C. 732, *Laxmi v. Venkat Rao*, 1925 Nag. 207; see, however, *Nand Kishore v. Ganesh*, 1929 All 446.
2. *Nanak Chand v. Mir Muhammad*, 1924 Lah. 702=75 I. C. 1048, *Usha Kotayya v. Nallamallu*, 1928 Mad. 900=109 I. C. 98; *Thakur Prasad v. Syameswari*, 1925 Cal. 1171=90 I. C. 98=42 Cal. L. J. 71, *Thakur Prasad v. Chandrika*, 1925 Oudh 850=81 I. C. 742.
3. *Nazo Bibi v. Hasan Ali*, 144 I. C. 610 (Iah).
4. *Bashiren v. Muhammad*, 158 I. C. 97.
5. *Amir v. Inderjit*, 14 M. I. A. 203; *Re Umon Sugar Mills*, 127 I. C. 428, 433.]
6. *Mattheers v. Munster* 20 Q. B. D. 141 cited in *Ghani Ram v. Haribux*, 59 Cal. 31.
7. *Bowstead*, Article 40, p. 68.
8. (1899) 2 Ir. R. 275.

usual for estate agents to enter into contracts on behalf of their principals, unless expressly authorised to do so, their duty being merely to submit to their principals any offers which may be made to them.¹ But where an owner of certain houses instructed a house and estate agent to sell them, and agreed to pay a commission on the price accepted, it was held that the agent having submitted an offer to the principal, who notified to him his acceptance of the price offered, the agent had authority to make and sign a contract for sale on the principal's² behalf.

A bailiff authorised to distrain for rent has implied authority to receive the rent and expenses due and a tender to him has the same effect as a tender to the landlord.³

According to English law⁴ a solicitor has implied authority:—

1. To receive payment of a debt for which he is instructed to sue.⁵

2. To receive the consideration for a deed upon its production duly executed and containing a receipt for such consideration by the person entitled to give a receipt therefor.⁶

3. Where he is authorised to conduct an action—

(a) to compromise,⁷ or refer the subject-matter thereof to arbitration;⁸

(b) to abandon the claims of his client, provided that they are within the scope of the action but not where they are collateral thereto;⁹

(c) to enter into an undertaking in reference to the subject-matter thereof.¹⁰

4. Where he is authorised to proceed to satisfaction—

1. *Chadburn v. Moore* (1892), 61, L. J. Ch. 674; *Hamer v. Sharp* (1874), L. R. 19 Eq. 109; *Thuman v. Best* (1907), 97 L. T. 239, *Lacock v. Bromley* (1920), 37 T. L. R. 48. See also *Vale of Neath Colliery v. Furness* (1876), 45 L. J. Ch. 276; cf. *Keen v. Mead*, (1920) 2 Ch. 574.

2. *Rosenbaum v. Belson*, (1900) 2 Ch. 267. *Allen v. Whiteman* (1920), 89 L. J. Ch. 534.

3. *Hatch v. Hale* 15 Q. B. 10; See also *Boulton v. Reynolds*, 2 El. & E. 369, where such tender was made to a man left in possession of the distrained property by the bailiff.

3. Bowstead; pp. 76 to 78.

4. Bowstead, pp. 76 to 78.

5. *Yates v. Freckleton* (1781), 2 Doug. 623. The authority extends to the solicitor's London agent who issues and endorses the writ. *Wray v. Alderson* (1837), 2 M. & Rob. 127.

6. Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 69, Trustee Act, 1925 (15 Geo. 5, c. 19), s. 23, extending the principle to solicitors of trustees.

7. *Butler v. Knight* (1867); L. R. 2 Ex. 109; 36 L. J. Ex. 66; *Prestwich v. Polcy* (1865), 34 L. J. C. P. 189; 18 C. P. (N. S.) 806; *Choun v. Parrott* (1863), 32 L. J. C. P. 197; 14 C. P. (N. S.) 74; *Re Newen* (1903) 1 Ch. 812; 72 L. J. Ch. 356; *Welsh v. Roe* (1918), 87 L. J. K. B. 529. See also *Little v. Spreadbury*, (1910) 2 K. B. 658; 79 L. J. K. B. 1119. Comp. *Re A Debtor*, (1914) 2 K. B. 758; 83 L. J. K. B. 1176.

8. *Faviell v. Eastern Counties Ry.* (1848), 2 Ex. 344; 17 L. J. Ex. 297; 76 R. H. 615; *Smith v. Troup* (1849), 7 C. B. 757; 18 L. J. C. P. 209.

9. *Re Wood*, Ex. p. *Wenham* (1872), 21 W. R. 104.

10. *Re Commonwealth Land, etc., Co., Ex. p. Hollington* (1873), 43 L. J. Ch. 99.

- (a) to issue and indorse a writ of *fi. fa.*, and do all other acts necessary to obtain the fruits of the judgment;¹
- (b) to order the sheriff to withdraw from possession under a writ of *ft. fa.*;² but his managing clerk has no implied authority, though left in charge of the office and business during the temporary absence of his employer;³
- (c) to compromise, after judgment.⁴

Under the same law a solicitor has no implied authority, as such :—

1. To interplead or agree to postpone execution after a judgment in his client's favour, he being then *functus officio*, unless authorised to proceed.⁵

2. To direct the sheriff to seize particular goods, when issuing a writ of *fi. fa.*, or otherwise to interfere with the sheriff in the performance of his duties.⁶

3. To institute any action or suit.⁷

4. To compromise a claim on behalf of his client before an action has been commenced in respect thereof.⁸

5. To sign a memorandum of a contract of which he is instructed to prepare a draft, so as to satisfy the provisions of the Law of Property Act, 1925.⁹

6. To receive the purchase-money for property sold (except on production of a deed, as above).¹⁰

7. To receive payment of a mortgage debt, though authorized to receive payment of the interest and permitted to have possession of the mortgage deed.¹¹

8. To take a cheque in lieu of cash in payment of a mortgage debt, of which he is authorised to receive payment.¹²

9. To pledge the credit of his client to counsel for fees.¹³

1. *Jarmain v. Hooper* (1843), 1 D. & L. 769; 64 R. R. 861; *Morris v. Salberg* (1889), 22 9 B. D. 614, C. A.
2. *Levi v. Abbott* (1849), 4 Ex. 588; 19 L. J. Ex. 62.
3. *Whyte v. Nutting*, (1897) 2 Ir. R. 241.
4. *Butler v. Knight* (1867), L. R. 2 Ex. 109; 36 L. J. Ex. 66. *Comp. Re A Debtor*, (1914) 2 K. B. 758; 83 L. J. K. B. 1176.
5. *James v. Ricknell* (1887), 20 Q. B. D. 164; 57 L. J. Q. B. 113; *Lovegrove v. White* (1871), L. R. 6 C. P. 540; 40 L. J. C. P. 253. But see *Sandford v. Porter*, (1912) 2 Ir. R. 551.
6. *Smith v. Keal* (1882), 9 Q. B. D. 340 C. A.
7. *Wright v. Castle* (1817), 3 Meriv. 12; *Atkinson v. Abbott* (1855), 3 Drew. 251.
8. *Macaulay v. Polley* (1897) 2 Q. B. 122; 66 L. J. Q. B. 665, C. A.
9. *Howard v. Braithwaite* (1812), 1 Ves. & B. 202; *Smith v. Webster* (1876), 3 Ch. D. 49; 45 L. J. Ch. 528, C. A. But see *Griffiths Cycle Corp. v. Humber* (1899) 2 Q. B. 414; 68 L. J. Q. B. 959, C. A.; *North v. Loomea*, (1919) 1 Ch. 378; 88 L. J. Ch. 217; *Horne v. Walker*, (1923) 2 Ch. 218; 92 L. J. Ch. 573.
10. *Viney v. Chaplin* (1858), 27 L. J. Ch. 434; 2 De G. & J. 468; 119 R. R. 213; *Ex. p. Swinbanks, Re Shanks* (1879), 11 Ch. D. 525; 58 L. J. Bk. 120 C. A.
11. *Wilkinson v. Candlish* (1850), 5 Ex. 91; 19 L. J. Ex. 166; 82 R. R. 588; *Kent v. Thomas* (1856), 1 H. & N. 473.
12. *Blumberg v. Life Interests, etc., Corp.*, (1897) 1 Ch. 171; (1898) 1 Ch. 27; 66 L. J. Ch. 127; 67 ib. 118, C. A.
13. *Mostyn v. Mostyn, Ex. p. Barry* (1870) L. R. 5 Ch. 457; 39 L. J. Ch. 780.

10. To take special journeys, or go to foreign parts, on his client's behalf.¹

An insurance agent is a limited agent not a general agent, and has no authority to contract for the company.² A local agent of an insurance company has no implied authority, as such, to grant, or contract to grant, policies on behalf of the company, that being outside the ordinary scope of his employment and duties.³ Where A is the agent of an insurance company, and has authority to receive the payment of premiums within fifteen days of their becoming due, he has no implied authority to accept payment after the expiration of that time.⁴ Similarly, an agent cannot bind the company as to the terms of the policy,⁵ or waive a forfeiture.⁶ Nor can he novate even though the premium is paid to him.⁷

(g) Authority of insurance agent.

A partner has implied authority from other members of the firm to procure an insurance to be effected for them and himself in partnership property,⁸ but this rule does not apply to part-owners⁹ unless they are jointly interested in the particular adventure insured in such a manner as to be partners therein.¹⁰

A consignor or commission agent to whom funds are remitted for the purpose of purchasing and shipping goods for his employee has not, merely as consignor, an implied authority to insure the goods on behalf of his principal, but such authority can be inferred from the established course of dealing between the two parties or by the usage of a particular trade.¹¹

Similarly, a consignee to whom goods are consigned for sale has no implied authority to insure them on behalf of the consignor and cannot, therefore, charge him with the premiums.¹² But where he has made advance on the goods consigned to him, he acquires authority to insure them in order to safeguard his own interest and then by alleging interest in himself and his consignor can recover the whole amount from the underwriters in the event of a loss to the goods.¹³ Unless the agent has himself acquired an interest in the subject of insurance¹⁴ an authority to insure may be revoked at any time before a binding contract is made.¹⁵

1. *Re Snell* (1877), 5 Ch. D. 815, C. A.; *Re Price* (1845), 9 Beav. 234; *Re Bevan* (1855), 20 Beav. 146.

2. *Accey v. Fernie* 7 M. & W. 151.

3. *Linford v. Provincial, etc. Insurance Co.* (1864), 34 Beav. 201.

4. *Accey v. Fernie*, *supra*; see also *London & Lucas Assurance Co. v. Fleming* (1897) A. C. 499.

5. *Forster v. Scottish Equitable Land Assurance Co.* 28 L. J. N. S. Ch. 225.

6. *Accey v. Fernie*, *supra*; but see *Wing v. Harvey*, 5 Deg. M. & G. 265.

7. *Accey v. Fernie* *supra*.

8. Halsbury, Vol. XVII. (1st Edn.) Art. 699.

9. *Bell v. Humphries*, 2 Stark. 345; *Roberts v. Ogilby*, 9 Price 269.

10. *Robinson v. Gleadowe*, 2 Bing. N. C. 156.

11. *Dier on Marine Insurance Co.*, Vol. II. pp. 101, 104.

12. *Ibid.*, pp. 107, 108; *Katlar*, p. 756.

13. *Wolff v. Horncastle*, 1 B. & P. 316; *Corruthere v. Sheddon* 6 Taunt. 14; *Craufurd v. Hunter*, 8 T. R. 13 (23); *Ebsworth v. Alliance Marine Insurance Co.* L. R. 8. C. P. 596.

14. *Smart v. Sandars*, 5 C. B. 895 (917, 988).

15. Halsbury, Vol. XVII (1st Edn.), Art. 700.

A person may have an express or implied authority to insure on behalf of another but unless he has such authority, he cannot recover the premium from the other person.¹

Insurance Agents.

It is to be observed that the Indian Insurance Act of 1938 now brings under control and places restrictions on persons acting as canvassers and commission agents as well as on rebates, commissions or any gratification paid to any person in order to induce him to take out a policy, or insure his own life. No person can now take or contract to pay any remuneration or reward by way of commission or otherwise for soliciting or procuring insurance business in India to any person except an insurance agent or a person acting on behalf of an insurer who for the purposes of insurance business employs insurance agents. An insurance agent is now defined as "an insurance agent licensed under section 42 (of the Act) being an individual who receives or agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business." Under that section the Superintendent of Insurance or any officer authorised by him in this behalf has power to issue licenses to such agents on payment of a prescribed fee. The licence issued is to remain in force for twelve months only from the date of issue and is then renewed from year to year.

The Act further lays down that in case of life insurance no insurance agent shall be paid a remuneration in any form exceeding forty per cent. of the first year's premium payable on any policy or policies and five per cent. of a renewal premium, or in the case of business of any other class, fifteen per cent. of the premium. However, insurers in respect of life insurance business only, may pay, during the first ten years of their business to their insurance agents fifty-five per cent. of the first year's premium payable on any policy or policies effected through them and six per cent. of the renewal premiums (section 40 of the Act). In addition to this, the Act further lays down that no person should allow or offer to allow either directly or indirectly, as an inducement to any person to take out or renew or continue an insurance in respect of any kind of risk relating to lives or property in India, any rebate of the whole or part of the commission payable or any rebate of the premium shown on the policy, nor shall any person take such a rebate under the said circumstances, except such rebate as may be allowed in accordance with the published prospectuses or tables of the insurer (section 41). Under this section the person wrongfully giving or receiving rebate is punishable with fine which may extend to one hundred rupees in the case of a person or agent inducing and rupees fifty in the case of a person taking out, renewing or continuing the policy.

(h) Implied authority of partners.

As regards partners in a firm, the law is that the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm.² This is subject to the proviso that in order to bind a firm, an act or instrument

Halsbury, vol. XVII, (1st Edn.) Art. 698 *French v. Barhhouse*, 5 Burr 272 S, 19 (1) Indian Partnership Act, 1932.

done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.¹

This authority of a partner to bind the firm is called his "implied authority." The Act, however, lays down² that in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to

- (a) submit a dispute relating to the business of the firm to arbitration.
- (b) open a banking account on behalf of the firm in his own name,
- (c) compromise or relinquish any claim or portion of a claim by the firm,
- (d) withdraw a suit or proceeding filed on behalf of the firm,
- (e) admit any liability in a suit or proceeding against the firm,
- (f) acquire immoveable property on behalf of the firm,
- (g) transfer immoveable property belonging to the firm, or
- (h) enter into partnership on behalf of the firm.

The Act, however, further prescribes that the partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner, and that, notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.³

Hence a partner's act binds the firm only if the other partners have in fact authorised or ratified it or if it is done in the course of carrying on the partnership business in the usual way⁴ i. e. in accordance with the ordinary practice of the partnership.⁵ The rule of the English law that "a power to do what is unusual, however urgent,"⁶ has been modified by the enactment of section 21 of the Act.⁷

It follows, therefore, that if the partnership be of a general commercial nature, a partner may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account

1 Indian Partnership Act, 1932, S. 22.

2 *Ibid*, S. 19 (2).

3 S. 20, Indian Partnership Act, 1932.

4 *Sobhmal v. Pohumal*, 13 I. C. 225 (S).

5 *Jagabhai v. Bustomji*, 9 Bom. 311, 317; but the question of necessity is not essential under this section though it may be so under section 21.

6 Lindley, pp. 179, 180.

7 Section 21 of the Act reads as follows :—

A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm."

of the partnership; he may draw, make, sign, indorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, cheques and other negotiable papers in the name and on account of the partnership.¹ When one partner enters into a contract in course of the business, such contract binds all partners² and even a sleeping partner is bound by contracts made by the ostensible partners in the ordinary course of the partnership business,³ though the liability should be consonant with the principles of justice, equity and good conscience.⁴ Thus, in a business of catching elephants a partner has been held liable on a contract of indemnity entered into by other partners for the possible loss of an elephant taken as a loan for the purpose of the business.⁵

Authority
to borrow.

Each partner is the agent of his co-partners for the purpose of contracting debts and obligations in the usual course of the partnership business.⁶ Thus, a promissory note received by the managing partner in course of the business and on behalf of the firm is binding on the other partners.⁷ So also, in a trading firm any partner has an implied authority to borrow money for the purpose of the business on the credit of the firm,⁸ and in such cases a partner has an implied authority to draw, accept, and endorse bills of exchange and other negotiable instruments on behalf of the firm.⁹

Even a dormant partner in a mercantile or ordinary trading partnership is liable upon every bill drawn by a partner in the recognized trading name of the firm, although his name does not appear on the face of the instrument,¹⁰ but the liability extends only to sums borrowed by the active partner in his capacity as a member of the firm.¹¹ A trading business is one which involves the purchase of and sale of goods, but it is wrong to say that every business, which necessarily involves the expenditure of money for the purpose of buying goods which the business requires is a trading business.¹² Where a partner of a trading firm borrows there is no duty cast on the person advancing the money to make any further enquiries, and the other partners are liable though the borrowing partner misappropriates the money¹³ and the transaction is unauthorised

1. Story on Agency, 124; adopted in *Bank of Australasia, v. Breillat*, (1847) 6 Moo. P. C. at p. 193. See *Ram v. Kasem*, 28 C. W. N. 824. See also notes on pages 28 to 31.
2. *Abdul Rahman v. Afzal Hussain*, 1923 Oudh 259=145 I. C. 233.
3. *Beckham v. Drake*, (1841) 9 M. & W. 79.
4. *Nundereput v. Uquhart*, 9 W. R. 355.
5. *Mathuranath v. Begencari*, 1928 Cal. 57=106 I. C. 516=46 Cal. L. J. 362.
6. *Chundee Charan v. Eduljee Cowjee*, 8 Cal. 678, 684.
7. *Goydhandas v. Raghuvirdas*, 1932 Bom. 539, *Maung Pe Thauing v. Toungou Timber Co.*, 10 Rang. 204=1932 Rang. 118=139 I. C. 210.
8. *Saremal Puranchand v. Kapurchand*, 1924 Bom. 260=77 I. C. 548.
9. *Harrison v. Jackson*, (1797) 1 Term Rep. 207; *Williamson v. Johnson* (1813), 1 B. & C. 146; *Motilal v. Una Commercial Bank*, 1930 P. C. 238=35 C. W. N. 1.
10. *Bunarsee v. Ghulam Hussain*, 13 W. R. 29, 30, P. C.
11. *Ram Chandra v. Kasem Khan*, 28 C. W. N. 824.
12. *Higgins v. Beauchamp*, (1914) 3 K. B. 1922, where it has been held that a partnership with the object of running a cinematograph entertainment is not a trading partnership. The term trading firm has been likewise defined in *Saremal Puranchand v. Kapurchand*, 1924 Bom. 260.
13. *Saremal Puranchand v. Kapurchand*, supra.

if the creditor has no notice of the fraud.¹ But the position would be otherwise if he has notice of suspicious circumstances which ought to have put him on inquiry.² In the case of a partnership not of a mercantile character there is no implied authority in one partner to bind the others by negotiable instruments. He must have express authority.³

Power to borrow is incidental to power to trade and power to pledge the business assets is incidental to power to borrow⁴ and so the managing partner may borrow and pledge partnership assets.⁵ According to English rule one partner can effect an equitable mortgage of immoveable property belonging to the partnership but not a legal mortgage unless with the express authority given by all the partners by deed, and it has been held that there is no reason why, following the English rule, he should not effect a legal mortgage as well.⁶ The observation of Straight J. that in India the presumption is against the existence of such a power was made in the case of a partnership between Englishmen and the case was not followed in the above Madras case especially as applied to natives in India. It has been held by the Judicial Committee that a mortgage by one of the partners of partnership property for the benefit of the firm is binding on a member of the firm, although he did not execute it.⁷ So, the managing partner has authority to execute mortgage of partnership property in order to raise money to carry on the business.⁸

Authority to mortgage.

Similarly, a mortgage by the managing member of a joint Hindu trading family for the purpose of the business is binding on all partners.⁹ Mortgage of the assets of a firm by the member with the consent and informal co-operation of the undisclosed partner, is valid and binding on the latter as principal.¹⁰ But a partner cannot give a valid charge upon partnership property (which he holds as trustee) for his private debt to a lender who knows the property to belong to the firm.¹¹

Objection under this score does not arise where there is no agreement between the parties restricting the partner from executing a mortgage.¹²

Put negatively, it may be stated that one partner cannot create a charge on partnership property, nor borrow money for the purpose of the partnership so as to make the other partners liable except under their authority, express or implied. But when they allow him to conduct the business of the partner-

1. *Suremal Puranchand v. Kapurchand*, *supra*. *Wiseeman v. Easton*, (1863) 8 L. T. 637; *Hood v. Easton*, (1826) Russ. 412.
2. See *Okell v. Easton & Okell*, (1874) 31 L. T. 330, *Lloyd v. Freshfield* (1820) 2 C. & P. 325; *Krid v. Hollinshead* (1825) 7 Dow. & Ry (K B) 444.
3. *Maung Phoinya v. Dawood & Co.*, 66 I. C. 584.
4. *Great Auction Estate & Monetary Co. v. Smith* (1891) 3 Ch. 432.
5. *Asan v. Somasundaram*, 31 Mad. 206.
6. *Harrison v. Delhi & London Bank*, 4 All. 437, 459.
7. *Juggendass v. Ramdas*, 2 M. I. A. 487=6 W. R. 10 P. C.
8. *Jaffer Ali v. Standard Bank of South Africa*, 1926 P. C. 135=107 I. C. 453=30 Bom. L. R. 762.
9. *Bemola v. Mohun Dass*, I. L. R. 5 Cal. 792.
10. *Jethabhai Keralbhai v. Chotalal Chunilal*, I. L. R. 34 Bom. 209.
11. *Wilkinson v. Eykyn*, (1866), 14 W. R. 470.
12. *Asan v. Somasundaram*, 31 Mad. 206, 210.

ship in such a manner as to make it appear that, to all intents and purposes, the whole control and management was vested in him, they would be liable to make good all advances that were made for the necessary purposes of the firm.¹

Acknowledgment

A partner has authority on behalf of himself and other partners to apply the assets in making payments on account of the outstanding debts which would have the effect of preventing them from being barred by limitation. On the same principle, he would have authority to pass acknowledgments which would have the effect of staying off the claims of creditors and would have on the other hand saved the claims from being barred by limitation.² But it must be shown that the acknowledgment was an act necessary for or usually done in carrying on the business of the partnership.³ Mere writing or signing an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it can be shown that he had otherwise power to bind that partner for the purpose of making such acknowledgment and in effect purported so to bind him.⁴ It should be noted however that any person having a general authority to pay the amount of a claim must necessarily have also authority to make part-payments to prevent time from becoming a bar to it.⁵ Hence the authority that has to be shown may be express or implied, and in a going mercantile concern such agency to strike balances in the firm account⁶ is to be presumed as ordinary rule.⁷ In respect of partnership debt a partner's authority thus extends to making an acknowledgment by part-payment so as to bind his co-partners.⁸

The Madras High Court in its earlier cases held that a part-payment by one partner of a going mercantile firm will not save the operation of limitation against the other partners, in the absence of evidence to show that in the course of business the partner who made the payment had authority to do so on behalf of the firm.⁹ And the mere fact that one of the partners of a going concern is in charge of a branch of such concern cannot lead to the inference that such partner has authority to bind the firm by an acknowledgment when pressed for payment.¹⁰ Following the above cases it was held that evidence of authority from the other partners is necessary and cannot be presumed.¹¹ But the Court, at the same time, observed that the above decisions require to be reconsidered in the light of the rulings of the English and other Indian High Courts. The point again rose and so far as those cases may be taken

1. *Harrison v The Delhi & London Bank* 4, All 437
2. *Abdullah v Ranchodlal*, 19 Bom L R. 86, *Dalsukhram v Kalidas* 26 Bom. 42
3. *Dalsukhram v. Kalidas*, 26 Bom 42, 49.
4. *Gadu v. Parsotam*, 10 All. 418
5. *Rala Singh v. Bhagwan Singh*, 1925 Rang. 30=2 Rang 367=84 I. C. 391
6. *Ram Rattan v. Sobha Ram*, 1929 Lah 512 ; *Kuljas Ram v. Wishan Singh*, 1932 Lah. 456=137 I. C. 771.
7. *Ibid*, *Frenzy, v. Dossa Doongersey*, 10 Bom. 358.
8. *Mahadeva v. Rama Krishna*, 1926 Mad. 114=80 I. C. 653.
9. *Valasubramania v. S. V. R. R. M. Ramanathan*, 32 Mad. 421.
10. *Shaikh Mohidren v. Official Assignee, Madras*, 35 Mad. 142.
11. *K. R. V. Firm v. Seetharamswami*, 37 Mad. 146.

to mean that direct evidence of specific authority is necessary they have been held not to be good law by a Full Bench which held that direct evidence is not necessary but the authority may be inferred from surrounding circumstances such as the position of the other co-contractors or partners.¹ There is thus no practical divergence of judicial opinion now with respect to the authority of a partner to acknowledge a partnership debt.²

One partner is bound by the act of another partner in settling an account between the partnership and a third person.³

Settling
accounts.

One partner has no implied authority to take a lease of a house which would be binding on the firm though the lease is taken for partnership purposes.⁴ In *Ragoonathdas v. Morarji*⁵ it was held that where one partner takes a lease of premises in his own name, though on behalf of the partnership, and with the assent of his partners, the latter are not liable to be sued by the lessor for the rent reserved by the lease. The ground of the decision was that a lease is not a mere contract but a conveyance and effects a transfer of property, and so far as the lessor is concerned, it must be deemed to be only on behalf of the person to whom the demise is made. But this view was dissented from by the Madras High Court in *Chinnaramanuja v. Padmanabha*,⁶ and the *ratio decidendi* of the Bombay case was met by the case of mortgage as to which there is no doubt that, although executed by one person it may be binding upon the partners or others who have authorised the act. But the Madras case does not seem to be a case of implied authority because in that case it appeared that by an agreement between the defendants any one partner was empowered to take a lease and execute any necessary document, such document being taken to be binding upon all the partners as if executed by them.

Lease

It may be observed that in the Bill, as originally drafted lease was specifically included in sub-section (2) of section 19 of the Indian Partnership Act, but that clause was subsequently deleted, leaving the Courts free to decide particular cases on their particular facts.

Section 22 of the Indian Partnership Act, 1932, prescribes that in order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm. Subject to the provisions of section 22, unless there is any particular restriction express or implied, in respect of any liability to be incurred by one partner with regard to a bill or promissory note which may be executed by one partner for the purposes of the partnership, and such restriction is known to the creditor

Liability of
partners on
documents
executed by
the partner

1. *Pandit Veeranna v. Veerabhadraswami*, 41 Mad. 427 F. B., *Dagul & Co., v. Radha Kishan*, 1935 Lah. 559=158 I 260.

2. See *Mahadeva v. Ram Krishna*, 1926 Mad. 114=90 I. C. 653.

3. *Manju v. Deramm*, 26 Mad. 186.

4. *Sharp v. Milligan*, 22 Beav. 606.

5. 16 Bom. 568, 574, 575.

6. 19 Mad. 471. See also *Raja Ram v. Daulat Ram*, 1937 Lah. 715=169 I C 535.

(see section 20) the other partner cannot escape liability for the partnership debt.¹ Even a minor partner may become a member in a partnership and in that capacity bind his co-partners by executing a promissory note on behalf of the partnership.² In partnership of a limited character, where there is a document of debt which on its face binds only one partner, other partners can be made liable only if it is shown that the obligation incurred by one partner was within operations natural to the partnership and for the partnership.³ So a bond executed by the managing partner for the purpose of the firm and within the scope of his authority is binding on the remaining partners.⁴ The principle that only the maker of a promissory note can be held liable thereunder is not applicable in a case where an independent contract is alleged and, therefore, the promisee can be allowed to adduce evidence as to the independent contract. If the plaintiff can show that there was a contract with the partnership and the promissory note executed by a partner in his own name was merely evidence of such contract, all the partners would appear to be liable.⁵

To bind the firm partner must act as agent of the firm

It is to be observed that a partner is an agent of the firm of which he is a member and while acting within the express or implied authority his act binds the firm. But in order that the firm may be liable for his act or any instrument executed by him he must act as agent of the firm, and not on his own account as principal in which case the firm would not be liable in spite of the fact that it derived benefit.⁶ The mere fact that money, borrowed by a partner in his own name on security belonging to him personally, has been used for the purposes of his firm with the knowledge of his partner does not render them liable,⁷ though he may be entitled to be indemnified by them.⁸ In other words, the ultimate use by the firm of money borrowed by one of its members on his own credit does not render the firm liable for the loan, and so the question upon which the liability or non-liability of the firm depends is not whether the firm obtained benefit under the contract but did the firm by one of its partners or otherwise enter into the contract. The circumstance that the firm obtains the benefit of a loan contracted by a single member is only a piece of evidence to show that he entered into the transaction as a member of the firm. So where one member of the partnership borrows money on his own credit by giving his own promissory note and he afterwards used the proceeds of that promissory note in the partnership of his own free will without being under any obligation to or contract with the

1. *M R P. R. S. Shanmuganatha v. K. Srinivasa*, 40 Mad. 727.

2. *Maung Aung Gyan v. Haji Dadu Shariff & Co.*, 42 I. 98.

3. *Karamali Abdulla v. Vora Karimji*, 39 Bom. 261=19 C. W. N. 337, P. C.

4. *Hakim Syed Ahmed v. Babukurnedan*, 24 W. R. 60, 61; see also *Jaggernan v. Ramdas*, 2 M. L. A. 487=6 W. R. 10 P. C.

5. *Ventakachalapati v. Ramakrishnayya*, 1930 Mad. 168=123 I. C. 358.

6. *Emphy v. Lye*, 15 East 7.

7. *Brann v. Lewis*, (1872), 1 Sim. 376, Halsbury, Vol. 22, p. 33, para 58.

8. *Broune v. Gibbins*, (1726) 5 Bro. Parl. Cas. 491; *Re Oundle Union Brewery Co., Croxton's case*, (1852) 5 De G. & Sm. 432.

lender so to do, the partnership is not liable for the loan.¹ A partner is not therefore liable for the action of the other partners unless the same is on behalf of the partnership,² nor for a loan contracted by another partner although the money was utilised for joint benefit unless the former assumed any liability for the same.³

The principle of agency does not exist in the case of a partnership which has ceased to be a going concern. After dissolution by death of a partner, another partner cannot bind the representative of the deceased by an acknowledgment of a debt without special authority.⁴ If at the time of the transaction the business was not a going concern, a balance struck by one of the partners or a loan raised by him does not bind the other partners, for in such circumstances it could not be said that the executant was acting as the duly authorised agent of the firm.⁵ When a firm is being wound up one partner cannot borrow money and mortgage the firm's assets except perhaps in the case of necessity, and cannot give an acknowledgment of a subsisting debt which would bind the firm.⁶ After a partnership has been dissolved and accounts settled any balance struck by a partner is without authority and consideration. It does not create any liability on the firm.⁷ However, the presumption continues to operate in favour of the firm's creditor so long as no notice of dissolution of partnership is given.⁸ Thus, an acknowledgment made in the usual course of and essential to the business by one of the partners in the absence of notice of dissolution to the creditor by the resigning partner is binding on the resigning partner.⁹ Similarly, an acknowledgment made by one partner after the death of one of the partners in respect of a debt due on transaction entered into before the death was held to be binding on the heirs of the deceased partner when no notice of dissolution was given under section 264, Indian Contract Act.¹⁰

No presumption of agency in case of dissolution of partnership.

It has been held under the English law that a surviving partner can give a valid security on the partnership assets for a debt incurred before the death of his partner,¹¹ and a partner has authority to pledge partnership property for partnership purposes after, as well as before, dissolution, in the course of winding up the business.¹²

1. *Ram Chandra v. Kasim Khan*, 1925 Cal. 29 = 28 C. W. N. 824 = 81 I. C. 513
2. *Seth Abde v. Askaram*, 1924 Nag. 411 = 84 I. C. 199
3. *Hummed Routh v. Aiyappa*, 1940, Rang. 60
4. *Sheonarain v. Babu Lal*, 1925, Nag. 268 = 85 I. C. 775
5. *Har Bhajan v. Sri Gopal*, 14 Lah. 188 = 1933 Lah. 415, *Butamal v. Raldu*, 40 P. R. 1889; *Premji v. Dorsa Goongersey*, 10 Bom. 358
6. *Malayandi v. Narayan*, 36 I. C. 225 (Bom.)
7. *Bhanun v. Jwanda*, 1926 Lah. 522 = 95 I. C. 88
8. *Dalmukham v. Kalidas*, 26 Bom. 42, 45, 49
9. *Bengal National Bank v. Jitindra Nath*, 56 Cal. 566 = 1929 Cal. 714 = 33 C. W. N. 412.
10. *Babu v. Dayambai*, 80 Bom. 5 (C. P. *Pramatha v. Bhagwandas*, 1932 Cal. 236 = 50 Cal. 40 = 136 I. C. 529.
11. *Re Clough, Bradford Com. Banking Co. v. Cure*, (1885) 31 31 Ch. D. 324
12. *Butchart v. Dresner*, (1853), 4 De G. M. & G. 542, C. A.; *Brown v. Kidger*, (1858) 3 H. & N. 853; *Re Litherland, Erparte Houden*, (1842) 2 Mont. D. & De G. 574; *Re Bourne Bourne v. Boarne*, (1906) 2 Ch. 427; *Halsbury*, Vol. 22, p. 27, para 47.

It has been held that where a person wants to escape liability on a document on the ground that he ceased to be a partner long before the document was executed, he must prove unequivocally that the partnership, which according to the terms of the document was still in existence, had determined by agreement between the parties, and if the documents on which he relies to prove that agreement can with equal justification be read as having two different meanings then he has failed to satisfy the onus which lay on him.¹

No implied
authority
of partner

Matters in which in the absence of any usage or custom of trade to the contrary, a partner has no implied authority have already been referred to.² In order that submission to arbitration may be binding on other partners it must be shown that the reference to arbitration was sanctioned by usage or custom of trade governing the particular business. Courts would take judicial notice of the custom of certain importing firms not to do business with any firm unless the latter agrees to refer matters in dispute to arbitration, and the Court will presume that a partner of a firm dealing with such importing firm has authority to bind his firm by agreeing to refer disputes to arbitration.³ In any case the special authority may, however, be implied from conduct and the submission may be binding on others, by ratification,⁴ and where the partner submitting to the arbitration has to make payments in accordance with the award passed, he is entitled to claim contribution from his partner.⁵

As an agreement to refer to arbitration by one of the partners though not originally binding may become so by acquiescence or acceptance of benefits, it has been held that the question whether an award on a reference to arbitration by one of the partners without the concurrence of the legal representatives of a deceased partner is binding on them is not a simple question of law and therefore cannot be taken for the first time in appeal.⁶

A partner similarly has no implied authority in the absence of any usage or custom of trade to the contrary, to compromise or relinquish any claim or portion of a claim by the firm. Thus, one of the partners cannot compromise a suit instituted in the name of the firm unless all the partners assent to it even if there is no fraud or collusion in the compromise which stands on a footing similar to arbitration.⁷ With regard to relinquishment, it seems that the cases contemplated by this provision

1 P. S. B. Charry, v Pohoomal, 50 Bom 665, 672=1926 Bom 585=99 I C. 495-28 Bom L. R. 1275

2 See notes on page 126.

3. *Shumell v Bansram*, 3 S L R 5=1 I C 937, *Firm of Khalsa Bros v Hariram*, 1924 Sind 29=83 I. C 539; see also *Firm Bishamber Mal v Firm Ganga Sahas*, 1923 Lah 212=71 I C 734, where the award was held to be valid against the firm though the submission was signed by the managing partner

4 *Purniah v. Sree Venugopala Rice Factory*, 22 M. L. T 520

5 *Venkatachalam v Ramanathan* 18 C. W. N 1025 P. C.

6 *Rai Dwarakanath v Haji Mohamed*, 18 C. W. N. 1025 P C

7 *Ram Nivas v Dissan Chand*, 1933 Lah 618=144 I. C. I, *Crane v Lewis*, 36 W R 480.

should be distinguished from cases in which a partner gives a discharge upon payment. Each partner is an agent of the firm, and therefore, "as a debtor may lawfully pay his debt to one of them, he ought also to be able to obtain a discharge upon payment."¹ On the same principle, it has been held in a number of cases that in the absence of fraud and collusion with the defendant, release given by a partner of a cause of action in which all the partners are jointly interested operates as a release by the firm even though the release is given after an action is brought on the same.² But "as a general proposition, an authority to receive payment of a debt does not include an authority to settle it in some other way" and "although each partner has power to receive payment of a partnership debt, and to give a discharge for it on payment, it does not follow that he has power to compromise or settle the debt in any way he likes without payment."³ In *Leake on Contracts* (page 673) it is stated that "a release or agreement amounting to a release, upon a valid consideration and in the form of a binding contract may be effectual in equity in discharge of the debt but a voluntary release without deed and without consideration is equally inoperative in law and in equity." The law is thus stated by Halsbury: "In the absence of fraud one partner may release a cause of action in which he and his partners are plaintiffs; but he must have express authority to consent to judgment, or to submit a dispute to arbitration, or to compromise on action."⁵ The last observation is based on *Crane v. Lewis*.⁶ Hence it seems that the implied authority of a partner to receive payment of a partnership debt and to grant an effective discharge of the same is not affected by this clause.

Though a payment by a debtor of the partnership to one of the partners is *prima facie* a payment to the partnership,⁷ an agreement by one partner to discharge a debt due to the firm by setting off his individual liability against it is not binding on the firm unless made within the consent of the other partners or subsequently ratified by them.⁸ A release by one partner would not operate as a release by the firm when the person released knew of an agreement between the partners that no one of them, acting singly, would have authority to give such release. Such knowledge can be proved by circumstances as much as by notice of the partnership deed, containing such restriction.⁹

1. Best, C. J. in *Stead v. Salt*, (1825) 3 Bing 103

2. *Furnival v. Weston*, (1882), 7 Moore C. P. 356. *Aston v. Booth*, (1820), 4 Moore (C.P.) 92; *Barker v. Richardson*, (1827), 1 Y. & J. 362; *Jones v. Herbert*, (1817), 18 E. R. 520; *Mangalsen v. Firm of Bhagvandas*, 1925 Sind 63=80 I. C. 538; see, however, *Crane v. Lewis* (1888) 36, W. R. 480.

3. Lindley, p. 195. see also *Nagappa v. Bhagwanji*, 59 Mad 1036=1036 Mad. 593=164 I. C. 239

4. Vol. 22, p. 28.

5. Vol. 22, p. 28.

6. (1888) 36 W. R. 480.

7. *Moore v. Smith*, (1851) 14 Beav 393

8. *Baikunt v. Hira Lal*, 13 Cal. L. J. 234.

9. *Krishna Kinkar v. Tarak Nath*, 38 C. W. N. 545

A partner in a trading firm has an implied authority to assign a debt due to the firm; but he has no such authority to assign a decree for money obtained by the firm for an amount which is less than the decretal amount.¹

In an ancestral Hindu joint family business the managing member can give a valid discharge without the concurrence of the minor member, when the discharge by an adult partner under the same circumstances would bind the minor.² But the son of a deceased partner cannot give a complete discharge of a debt due to the partnership,³ and a release of property mortgaged to a firm as a whole is useless unless it is known who the individual partners are and whether the executant of the release is authorised by them to act on their behalf, because a conveyance to the firm operates as a conveyance to the individual partners.⁴

Although payment made to one partner is generally good payment to the firm, payment to a firm of a private debt due to one partner is not a discharge unless it is shown that the firm had in fact authority to receive it.⁵

The right of some of the partners of a firm to avoid a fraudulent release of a debt by the other partners and to recover their share of the released debt is personal to them, and their legal representatives are not entitled to such a right.⁶

Withdrawing
suit or
proceeding

A partner has similarly no implied authority, in the absence of any usage or custom of trade to the contrary, to withdraw a suit or proceeding filed on behalf of the firm.⁷ It seems unreasonable to hold that a partner cannot compromise a claim by the firm but that he can withdraw the suit. Hence this clause.

Acquiring or
transferring
immoveable
property

A partner has no implied authority also in the absence of any usage or custom of trade to the contrary, to acquire immoveable property on behalf of the firm, or to transfer immoveable property belonging to the firm.⁸ This, however, does not affect the implied authority of a partner to sell any part of the goods or personal property of the partnership unless it is known to the purchaser that the intention of the partner is to convert the proceeds to his own use.⁹ Similarly, it does not affect the implied authority of a partner to buy on credit of the firm any goods of a kind used in its business.¹⁰

See also notes under "authority in emergency" and "disclosed and undisclosed principal."

1 *Krishnaji Bharanaji & Co., v. Abdulrazak Ahmedbhai* 43 Bom L. R. 888=A 1 R 1942 Bom 22

2 *Sadullakhan v. Bhanamal*, 58 P. R. 1882

3 *Lal Singh v. Dhanna Singh*, 1928, Lah 832=109 I C 50

4 *Huachand v. Jayngopal*, 49 Bom 245=1925 Bom 66=89 I C 553=26 Bom L R 1049

5 *Percell v. Brodhuist*, (1901) 2 Ch. 160.

6 *Palanappa v. Veerappa*, I. L. R. 41 Mad 446

7 Clause (b), S. 19 (2) Indian Partnership Act, 1932.

8 Clauses (f) and (g), S. 19 (2), Indian Partnership Act 1932

9 *Ex-parte Bonbonus*, (1809) 8 Ves. 540

10 *Bond v. Gibson*, (1808) 1 Camp 185; See Mutia's Indian Partnership Act (2nd Edn.) pp. 62 to 76.

(1) Implied authority of directors and agents of companies.

A resident agent and manager of an unincorporated mining company has implied authority to purchase goods necessary for the working of the mine—but not to borrow money, however pressing may be the necessity for the loan²—on the credit of the shareholders. So also directors of an unincorporated mining company have implied authority to employ mining officers, and purchase on the credit of the members of the company goods necessary for working the mine, and to make any other contract usual or necessary in the management thereof in the ordinary way,³ but not to bind the members by negotiable instruments, nor to borrow money on their credit, either for the purpose of carrying on the mine or for any other purpose, however useful and necessary, the general rule being that directors of unincorporated companies have only such powers as are expressly or by necessary implication conferred upon them by the members.⁴ The directors of an ordinary trading or banking company have, however, implied authority to borrow money for the purpose of the business of the company.⁵ It has been held that directors who have express authority to fix the time and place for, and to adjourn general meetings of the company, have no implied authority to postpone a general meeting which has been duly convened.⁶

An agent in charge of a business has implied authority to bind his principal by raising a loan for the purpose thereof, if his act is necessary, or is usual in the management of the particular business or is justified by an emergency. Thus though the managing agent of a company has no general power to borrow money on behalf of the company, he is authorised to incur a temporary loan in an emergency for protecting the interests of the company.⁷ If, however, the implied authority of an agent to raise a loan is not established, but it is proved that the sum borrowed or a portion thereof has been applied for the benefit of the business, the creditor is entitled to be reimbursed by the principal to the extent he has been benefited. Thus, where the agent raised a loan for the urgent need of running a press belonging to his principal and it appeared that the press would have stopped if the money had not been borrowed, *held* that the agent had implied authority to borrow and that the principal was bound to pay the same.⁸ Similarly, an agent having general power of attorney to act in some big business or series of transactions may be presumed to have all usual powers including the power to transfer decrees for consideration.⁹

1. *Hawken v. Bourne*, (1841), 8 M. & W. 703.
2. *Hartayne v. Bourne*, (1841), 7 M. & W. 565; *Kirkcaldy v. Bennett* (1847), 17 L. J. C. P. 17.
3. *Tredwen v. Bourne*, (1840), 6 M. & W. 461; *Steigensberg v. Carr* (1841), 3 M. & G. 191.
4. *Dickinson v. Valpy* (1829) 5 M. & R. 126, *Hurmenter v. Norris*, (1851), 6 Ex. 796.
5. *Er. P. Pitman & Edwards* (1879), 12 Ch. D. 707, *Macfar v. Sutherland* (1854), 3 E. & B. 1; *Royal British Bank v. Turquand* (1855), 24 L. J. Q. B. 327.
6. *Smith v. Purina Mines*, (1906), 2 Ch. 193.
7. *Dehradun—Munro Electric Tramway Co. v. Jugmandar*, 1931 All. 820=134 I. C. 244.
8. *Dhanpat v. Allahabad Bank*, 2 Luck. 253=98 L. C. 788; See also *Kusinath v. Hiramba*, 1 Cal. L. J. 199.
9. *Krishna v. Raja of Vizianagram*, I. L. R. 38 Mad. 832

(j) of manager of business.

A manager of a business has ostensible authority to order such things as are necessary in the ordinary course of business,¹ but it is not part of such ostensible authority that he should borrow money,² nor that he should buy on behalf of a limited company its own shares.³ If, however, the manager does borrow and uses the loan for the principal's benefit, the latter is liable for it to the third party as money had and received to his use.⁴ And giving a promissory note as security for an advance has been held not within the authority of the general manager of an importing business.⁵ If a person not only allows another to act as manager, but has the business conducted in such manager's name, then the manager has ostensible authority to do whatever is incidental to carrying on the business. Drawing and accepting bills of exchange are incidental to the ordinary conduct of such a business. Such a manager has therefore implied authority to accept a bill in the name in which the business is carried on (i. e. his own name), and the principal is liable on a bill so accepted.⁶

In *Watteau v. Fenwick*⁷ the plaintiff sued the defendants, the owners of an hotel, for the price of cigars supplied to the manager, and the case was argued on the ground that as the plaintiff did not know that the manager (the licensee) had a principal, there was no holding out, and the principals were not liable, or at the outside only to the extent of the authority they had in fact given him, viz. to buy for cash only. The Court, however, held that the principals were liable to the extent of the ostensible authority that the agent had, and decided that ordering cigars was within such authority.

(k) Authority of servants of railway companies.

It has been held under the English law that the servants of a railway company have implied authority to remove passengers from carriages in which they are misconducting themselves or travelling without having paid the fare,⁸ and to do whatever else is necessary for the enforcement of the company's bye-laws.⁹ They have, therefore, implied authority to arrest persons infringing the bye-laws where that remedy is prescribed by statute. So, a railway booking clerk, part of whose duty is to keep in a till under his charge money belonging to the company, has implied authority to do all acts necessary for the protection of such money: but he has no implied authority to give into custody a person whom he suspects of having attempted to steal from the till, after the attempt has ceased, and there is no further danger to the property of the company.¹⁰ In *Edwards v. L. & N.W.Ry.*¹¹ it was held that a foreman porter who was in

1 *Hauken v. Bouïrne* (1841), 8 M. & W. 703; *Richardson v. Cartwright* (1844), 1 C. & K. 328; *Smith v. Hull Glass Co.*, (1852), 11 C. B. 897.

2 *Hautayne v. Bourne*, *supra*.

3 *Cartmell's Case* (1874), 9 Ch. Ap. 691.

4 *Reid v. Rugby & Co.* (1894), 2 Q. B. 40.

5 *Re Cunningham & Co.*, (1887), 36 C. D. 532.

6 *Edmunds v. Bushell* (1865), L. R. 1 Q. B. 97, (1893), 1 Q. B. 346.

8 *Loire v. G. N. Ry.* (1893), 62 L. J. Q. B. 524.

9 *Edwards v. L. & N. W. Ry.* (1870), L. R. 5 C. P. 445.

10 *Allen v. L. & S. W. Ry.* (1870), L. R. 6 Q. B. 65.

11 (1870), L. R. 5 C. P. 448; *Ferry v. G. N. Ry.*; (1898), 2 Ll. R. 352.

charge of a station in the absence of the station-master, had no implied authority to give into custody a person whom he suspected to be stealing the company's property, because such an act was not within the ordinary scope of his employment or duties.

Similarly, it has been held that a station-master has no implied authority, as such, to pledge the credit of the railway company for medical attendance to an injured passenger.¹ But the general manager of a railway company has implied authority to order medical attendance for a servant of the company, on the company's credit.²

A is the manager of an estate. He has implied authority to contract for the usual and customary leases,³ and to give and receive notices to quit to and from the tenants;⁴ and to enter into agreements with tenants authorising them to change the mode of cultivation, and providing for the basis on which compensation for improvements shall be payable on the determination of the tenancy.⁵

(b) Other
Miscellaneous
cases

The foreman of a saw-mill has implied authority to enter into a written contract for the sale of staves.⁶

The matron of a hospital has implied authority to pledge the credit of the managing committee, for meat supplied for the use of the hospital.⁷

A is the bailiff of a large farming establishment, all payments and receipts in reference thereto passing through his hands. He has no implied authority, as such, to draw or indorse bills of exchange in the name of his principal.⁸ A rent collector has no implied authority, as such, to receive notice to quit from a tenant.⁹ So, a steward has no implied authority, as such, to grant leases for terms of years,¹⁰ nor the cashier of a picture engraver to sell his masters's engravings.¹¹

A groom or coachman has no implied authority, as such, to pledge the credit of his master for forage for the master's horses, where it is not part of his business to supply forage for his master's horses.¹²

A is the managing owner (ship's husband) of a ship. He has implied authority to pledge the credit of his co-owners for all such things, including repairs, as are necessary for the usual or suitable employment of the ship.¹³ But he has no implied

1. *Cox v. Midland Ry* (1849), 3 Ex. 268. See also *Houghton v. Pakington*, (1912), 3 K. B. 308; *Langan v. G. W. Ry* (1874) 30 L. T. 173.

2. *Walker v. G. W. Ry* (1867) L. R. 2 Ex. 228.

3. *Peers v. Sneyd*, (1853), 17 Beav. 151.

4. *Papillon v. Branton*, (1860) 29 L. J. Ex. 265; *Jones v. Phipps* (1868), L. R. 3 Q. B. 567.

5. *Re Pearson*, (1899) 2 Q. B. 618.

6. *Richardson v. Cartwright*, (1844), 1 C. & K. 328.

7. *Real & Personal Advance Co v. Phalempin* (1893), 9 T. L. R. 569, C. A.

8. *Davidson v. Stanley* (1841), 3 Scott N. R. 49.

9. *Pearse v. Boulter* (1860), 2 F. & F. 133. A steward has such implied authority, *Roe v. Rochester v. Pierce* (1809) 2 Camp. 96—11 R. R. 673.

10. *Goffen v. Gardner*, (1856), 21 Beav. 540—11 R. R. 195.

11. *Graves v. Masters* (1883), 1 C. & E. 73.

12. *Wright v. Glyn*, (1902), 1 K. B. 745.

13. *The Huntsman*, (1894) p. 214; *Barker v. Hingley* (1863), 32 L. J. C. P. 270.

authority, as managing owner, to insure the vessel on behalf of his co-owners,¹ or to agree to pay a sum of money for the cancellation of a charterparty made by him on their behalf.²

In *Howard v. Chapman*,³ a traveller for the sale of goods in the provinces on behalf of a principal in London was held to have implied authority to receive payment in money for the goods sold by him, but not to accept other goods by way of payment.

An agent in charge of a business has implied authority to raise a loan for the purposes thereof only if his act is necessary for, or is usual in the management of the particular business or is justified by an emergency. An implied authority to agree to the payment of a particular rate of interest must be made out in the same manner as an implied authority to raise a loan.⁴

Where goods are consigned to a foreign merchant as security for an advance, *albeit* he may be a factor entrusted with the sale of goods on commission, and by reason of the fall in the market or other causes his security is declining in value and becoming insufficient, such foreign merchant is invested with a power of sale over the goods after notice to the principal, although the latter may place a limit on their sale, and desire to hold them on, if he does not put his factor in funds to make up the deficit so caused.⁵

As it is necessary and useful for all persons who sell produce to European firms on *Karachi Pass terms*, to bind themselves by an arbitration clause, under which all disputes are referred to two European merchants in Karachi, an agent who has authority to enter into such a contract, has also authority to sign the ordinary form of contract, which includes a reference to arbitration.⁶

An authority to purchase does not imply an authority to sell, and the mere fact that the principal did not question the agent's right to sell does not prove that he consented to the latter's exercising such right.⁷

A *gomashita* has a general authority to manage his employer's business, not as a mere agent, but has power to do all acts necessary for carrying it on, and to authorise brokers to make contracts.⁸ A broker authorized to sign a particular contract

1 *Robinson v. Gleadon* (1835), 2 Bing N C 156.

2 *Thomas v. Lewis* (1878), 4 Ex. D 18.

3 (1831), 4 C. & P. 508; See *International Sponge Importers v. Watt*, (1911) A. C. 279.

4 *Heramba Chandra Pal Choudhury v. Kasi Nath Sukul*, 1 Cal. 1, J. 199; *Dehra Dun Municipal Electric Tramway Co. v. Jagmandar*, 53 All. 1009=1931 All. 820=134 I. C. 244. See also *Ghani Ram v. Raja Mohan Bikram Shah*, 6 Cal. L. J. 539; *Ferguson v. Umi Chand Baid*, 33 Cal. 343; *Bunicee Lal Sahoo v. Moheshur Singh*, Marsh 544, 2 Hay 44; *Er P. Pitman & Edwards*, 12 Ch. D. 707; *Muelar v. Sutherland*, 3 E. & B. 1; *Royal British Bank v. Turquand*, 5 E. & B. 240. See per contra *Dickinson v. Walpy*, 10 B. & C. 128, and *Burmester v. Norris*, 6 Ex. 796.

5 *Jafferbhut Ludhabhoy Chattoo v. Charlesworth*, 17 Bom. 520.

6 *Louis Dreyfus & Co. v. Araro Mat*, 4 I. C. 1151; see also *Thomas Batram Shimicell v. Bemiran Gorindram*, 1 I. C. 937.

7 *Goluck Chunder Choudry v. Kanto Pershad Hazaree*, 15 W. R. 317.

8 *Jardine Skinner & Co. v. Nathu Ram, Bourke*, A. O. C. 122.

has no authority to sign it if it contains a stipulation unknown to the employer and *vice versa*. Where general authority is given to an agent, it implies a right to do all subordinate acts incidental to and necessary for execution of that authority, and if notice is not given that the authority is specially limited, the principal is bound.¹

It has also been held under the English law that a bank manager has no implied authority to arrest or prosecute supposed offenders, on behalf of the bank.² Authority to arrest or give persons into custody is only implied when the duties of the agent would not be efficiently performed without such authority. Thus, a servant has implied authority, as a general rule, to give persons into custody when such a step is necessary for the protection of his master's property, but not merely for the purpose of punishing a supposed wrong doer.³ So, the manager of a restaurant has implied authority to give into custody persons behaving in a riotous manner.⁴

It has also been held that if A is employed as a general agent for the sale of goods intrusted to his possession, he has no implied authority to pledge the goods.⁵ A house furnisher's salesman employed at a salary and commission, has no authority to cancel a sale effected by him.⁶ A commission agent is authorised to buy goods in England on behalf of a foreign principal. It is not usual to pledge the credit of the foreign principal in such cases. The agent has no implied authority to pledge the principal's credit, and the fact that they have agreed to share the profit and loss does not affect this rule.⁷

Commission agents have implied authority to settle at the market rate the goods purchased by them on behalf of the principal on his failure to pay the price at their notice.⁸

Where the evidence goes to show that a particular person said to be an agent of the defendant was really his general agent, and did transact business of various kinds for his principal, it is unnecessary to prove special power entitling him to enter into a particular contract of bargain and sale.⁹ The clerk of a Chetty firm appointed to deal generally with the firm's land and who has spoken and acted as the local manager of such land has been held to have authority to let out the lands and thereby to bind his master.¹⁰

1. *Collen v. Garaner*, 21 Beav. 540.
2. *Bank of New South Wales v. Owen* (1879), 4 App. Cas. 270.
3. *Stevens v. Hinshelwood* (1891), 55 J. P. 341, C. A.; *Knight v. North Met. Tins Co.* (1898), 78 L. T. 927; *Hanson v. Walter*, (1901), 1 K. B. 390.
4. *Ashton v. Spiers* (1893), 9 T. L. R. 606; *Comp. Stedman v. Baker* (1896), 12 T. L. R. 451 C. A.
5. *City Bank v. Barton* (1880), 5 App. Cas. 664, H. L. Authority to sell shares does not confer authority to pledge. *Waltho v. Brooks* (1885), 1 T. L. R. 565.
6. *Leckenby v. Wolman*, (1921), W. N. 100.
7. *Hutton v. Bullock*, (1874), L. R. 9 Q. B. 572 Ex. Ch.; *Poirier v. Morris*, (1853), 2 El. & Bl. 89=22 L. J. Q. B. 313.
8. *Firm Roop Ram v. Firm Nanak Ram* 1927 Lah. 493=103 I. C. 543=28 P. L. R. 470.
9. *Ram Baksh v. Kishoree Mohun*, 12 W. R. 130.
10. *R. M. K. S. Firm v. Maung Ba Gyar*, 1927 Rang. 44=99 I. C. 748.

Where a general *moktear* empowered to act on behalf of all co-sharers does formal acts to enforce the rights of the principals (the *zamindars*), it is not necessary to trace back his authority in each case to the explicit sanction of every single member of the family. *Mooktears* must be considered to have a certain discretion and unless contrary is shown, to do such acts as come within the ordinary scope of their duty with authority.¹

An authority to receive money for the principal implies an authority to do every lawful thing which is necessary in connection with that act, *e. g.*, accepting money in payment of one particular instalment or waiving the default made in paying an overdue instalment.² When a pleader of a bank receives money and certifies payment under a decree on behalf of the bank, he does so as an authorized agent of the bank which cannot say that the amount has been withheld by the pleader.³

An agent authorized to carry on the business of a money-lender and financier is authorized to pledge the credit of the firm.⁴

A power of attorney to collect outstandings includes a power to collect decree amount based on debts incurred even before the grant of power.⁵

Where goods purchased by a person are received by another and dealt with by him, it is a sufficient inference in law that the former is an agent for the latter.⁶

The binding character of a contract done by an agent may be inferred from the facts and circumstances of the case, or the contract must be shown to fall within the class of contracts which the agent was authorised to enter into in course of his duties or to be necessary in order to do an act which the agent was authorized to do.⁷ Where, therefore, the son of a *shebait* did the ordinary duties of management of the *debutter* properties *e. g.*, passing *pattani* orders for small *jamias*, he had no implied authority to settle a big *jalkar mehal* belonging to the *debutter* estate.⁸

Unless expressly so empowered an agent cannot make his principal a surety for another's loan nor can he borrow money in his principal's name for another nor can he thrust a partner upon his principal or sign a pronote for his principal jointly with another person.⁹

The manager or managing director of a mill company has no implied authority to purchase on behalf of his mill liability

1. *Hurry Kinto v. Motee Lal*, 14 W R 36.

2. *Manohar Lal v Sakina Begum* 37 I. C 442 (Oudh)

3. *Unao Com. Bank v. Mohar Gormid*, 1930=All. 659

4. *Bank of Bengal v. Ramanathan*, I. L. R 43=Cal. 527

5. *Srinivasa v. Tirumatal* 15 M L T 337.

6. *Pulin Behary v. Matthunathan*, 1928=Cal 863=110 I C 817

7. *Sri Gopal v. Sashi Bhusan*, 60 Cal 111=1933 Cal 109=142 I C 40=36 C. W. N. 1108, 1117

8. *Ibid.*

9. *Ramanathan v Bank of Bengal* 23 I. C 516 (Bur)

of a stranger and still less of their own manager or his partner in a private transaction of his own.¹

An estate or house agent authorised to procure a purchaser has no implied authority to enter into an open contract of sale. He must be authorised to make a binding contract of sale as there is a substantial difference between an authority to sell and an authority to find a purchaser.²

The mere fact that the defendant used to write letters on behalf of his principal is not sufficient for an inference that he was an authorised agent for the purpose of making an acknowledgment of liability.³

An agent has no authority to execute a pronote when the principal is not doing business involving execution of bill of exchange.⁴

A *gomashta* employed to collect return is not entitled to distrain unless he has been expressly authorised by power of attorney; and the principal will not be bound by the agent's acts done without authority unless he ratified them.⁵ A *moffussil naeb* has no power to grant *pattas* at fixed rents as it does not fall within the scope of his duties.⁶ So the grant of a *mokurari* lease is beyond the scope of a *naeb's* general authority.⁷

Power given to an agent to grant leases does not include a power to contract with the lessee for recovery of costs of litigation from the lessor. In such cases the agent is liable to the lessee,⁸ as an agent who acts contrary to the authority given to him by his principal is himself liable on the transaction in which he has so acted.⁹

A special authority is required to empower a mercantile agent to draw or endorse bills and notes, but the authority may be implied from circumstances.¹⁰

Where a principal has allowed an agent to make payment of money for him, the knowledge of the agent must be imputed to the principal. In such a case the principal cannot be heard to say that he was acting under a mistake of fact when the agent who made the payment and who was permitted to do it, was aware of all the facts.¹¹

Where the money advanced was the firm's money, but the mortgage was in favour of the firm's agent, the mere fact that

1. *Raja Bahadur v. Bombay Cotton Mfg. Co.*, 19 C. W. N. 621 P. C.

2. *Durga v. Rajindra*, 1923 Cal. 57=36 Cal. L. J. 467=77 I. C. 558. See also *Pusha v. Indra*, 1922 Cal. 397=49 Cal. 389=69 I. C. 978.

3. *Uma Shankar v. Gorind Nurain*, 1924 All. 855=46 All. 892=80 I. C. 6.

4. *Ram Het v. Buncari*, 1938 Lah. 41=171 I. C. 412.

5. *Ranjay v. Kally Mohan*, Marsh 282.

6. *Goluckmonee v. Assimooddeen*, 1 W. R. 56; see also *Ooma Tara v. Prena*, 2 W. R. 155; *Punchanun v. Pearey Mohun*, 2 W. R. 255; *Kalu Koomar v. Anees*, 8 W. R. Act X, 1.

7. *Unnoda Pershad v. Chunder*, 7 W. R. 394.

8. *Kenny v. Mookta Soonderee*, 7 W. R. 419.

9. *Gomanee v. Jeewan*, 2 Agra 33.

10. *Pestonjee v. Gool Mohammad*, 7 Mad. R. C. 369.

11. *Shiva Prasad Singh v. Srischandran Nandi*, 1943 Pat. 327=22 Pat. 220=210 I. C. 426.

he used the firm's initials would not show that the transaction was entered into by the firm.¹

33. Authority conferred by custom or usage.

As already noted,² section 1 of the Indian Contract Act, 1872, expressly saves any usage or custom of trade. The term "usage of trade" is to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants which is part of the law of the realm and is to be collected from decisions, legal principles, and analogies, and, according to the opinion now received, can still be increased by proof of living general (not merely local) usage.³ Such a usage remains unaffected by the provisions of the Act, even though it may be inconsistent with those provisions.⁴

Section 92 (5) of the Indian Evidence Act, 1872, enacts that, though a contract may be in writing, oral evidence may be adduced to prove any usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of that description, provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.⁵ And further such incident should not be inconsistent with the general provisions of the Contract Act, having regard to the words "nor any incident of any contract not inconsistent with the provisions of this Act."

This is a reproduction of the English law on the subject.⁶ As to the evidence necessary to prove a usage of trade, it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient imported by the parties into their contract. To prove such a usage, there needs not either be antiquity, the uniformity, or the notoriety of custom in its technical sense; the usage may still be in course of growth, and may require evidence for its support in each case.⁷ See also Evidence Act, S. 13 (b).

Thus, where a principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well defined and publicly known usage, it is the presumption of law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage.⁸ According to the English law, every agent has implied authority to act, in the

1. *Mohomed Usman v. Jambuhngam Chettiar*, 1941 Rang. 122=195 I C 221

2. See notes on pages 7 and 8; See also Pollock & Mulla, p. 8 to 10.

3. See *Bechuanaland Exploration Co., v. London Trading Bank* (1898) 2 Q. B. 658; *Edelstein v. Schuler Co* (1902) 2 K. B. 144.

4. Vides notes on pp. 7, 8.

5. See *Ruttons Rowji v. Bombay United Spinning & Weaving Co.* (1917) 41 Bom. 518, at pp. 538, 540=37 I. C. 271.

6. *Per Cur.* in *Brown v. Byrne* (1855) 3 E. & B. 715=23 L. J. R. B. 316; and in *Humfrey v. Dale*, (1857) 7 E. & B. 274 26 L. J. Q. B. 137.

7. *Juggomohun Ghose v. Manickchand*, (1859) 4 W. R. 8, 10=7 M. I. A. 263, 282; *Wittenbaker, v. Galstaun.* (1917) 44 Cal. 917, at p. 925=43 I. C. 11

The allowance of new usage involves the possibility of allowing change in previous usage; *Moult v. Holliday* (1898) 1 Q. B. 125, 130.

8. *Mechem*, §. 716.

execution of his express authority, according to the usage and customs of the particular place, market, or business in which he is employed. This is subject to the proviso, that no agent has implied authority to act in accordance with any usage or custom which is *unreasonable*, unless the principal had notice of such usage or custom at the time when he conferred the authority or to act in accordance with any usage or custom which is unlawful.¹ Further, the question whether any particular usage or custom is unreasonable or unlawful is a question of law. In particular, a usage or custom which changes the intrinsic character of the contract of agency, or a usage or custom whereby an agent who is authorized to receive payment of money may receive payment by way of set-off, or by way of settlement of accounts between himself and the person from whom he is authorised to receive payment, is unreasonable.²

Such a usage must also not violate any positive law,³ it must be shown by clear and satisfactory evidence,⁴ and it must have existed for such a long time, and become so widely and generally known as to warrant the presumption that the principal had it in his view at the time of appointment of the agent.⁵

The word 'usage' would include what the people are now or recently in the habit of doing in a particular place. It be that this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practised there would be usage.⁶ To support on the ground of usage, there needs not either be the antiquity the uniformity or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth: it may require evidence for its support in each case; but in the result it is enough if it appears to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract.⁷

Evidence of
usage and
custom

Evidence of usage of trade which the parties making the contract knew or may be reasonably presumed to have known is admissible for importing the terms into the contract respecting which the instrument is silent.⁸ It has long been settled in commercial transactions that evidence of custom or usage is admissible to annex incidents to written contracts in matters to which they are silent.⁹ Similarly, when the custom of a country

1. Howstead, Art. 41, p. 70.

2. *Ibid.*

3. Mechem, § 716 and authorities cited therein.

4. *Greenwich Insurance Co. v. Waterman*, 54 Fed. 839; *Rhodes v. Belhor* 36 Oreg. 141.

5. *Adam v. Pittsburgh Insurance Co.* 95 pa. 348; *Citizen's Bank v. Grufflin*, 1 Am. Rep. ft.; See Katia, p. 142.

6. *Dalglis v. Guzuffer*, 23 Cal. 427, 429; *Sariatullah v. Pran Nath*, 26 Cal. 184, 187; (Cases under sections 178 and 183, Bengal Tenancy Act).

7. *Juggomohun v. Manickchand*, 7 M. I. A. 263, 292 P. C.

8. *Joy Lall & Co., v. Manmatha*, 20 C. W. N. 365.

9. *Hutton v. Warren Clerk*, 1 M. & W. 466; Foll. in *Pradyote Kumar v. Gopi Krishna*, 37 Cal. 322=11 Cal. L. J. 209.

or a particular place is established, it may enter into the body of a contract without being inserted; both parties are supposed to know and to be bound by it, unless provision to the contrary is made in the contract.¹ The principle upon which contractual obligations are allowed to be modified by custom or usage is that such custom or usage may enter into the body of a contract without being expressly inserted as both parties are supposed to know it and to be bound by it.²

The usage must apply to a particular country or to a particular place and does not include the practice, for example, prevailing on a particular estate or in a particular Bank. When a certain practice is not a usage, in order that the practice may be imported as a term of the contract it must be shown that the practice was known to the person whom it is sought to bind by it and that he assented to its being a term of the contract.³

A customary right owes its origin to common consent, and when fully developed may be treated as incorporated into the contract by implication.⁴ A custom should be shown to be so notorious that all persons can be held to enter into the contract with knowledge and notice of the custom.⁵ The usage must be shown to be certain and reasonable and so universally acquiesced in that everybody in the particular trade knows it or might know it if he took the pains to enquire.⁶

The law recognises the fact that men assume that the words of the contract will be understood in their trade meanings, and that the terms of their agreements will be governed by the well-recognized usages of the callings to which they relate, and necessarily looks to these usages to ascertain the real thought of the contract.⁷ Where ambiguous terms or phrases are found in a mercantile contract evidence of usage is admissible to explain the meaning of the expressions in the particular trade or locality; and when a contract is silent in respect of some mercantile term or condition which according to the course of business established in a particular trade it is customary to find included in such a contract, evidence of the custom is admissible to prove that such a term or condition formed part of the contract, unless the incorporation of the term or condition in the contract will have the effect of "introducing something repugnant to or inconsistent with the tenor of the written agreement."⁸

But though evidence of mercantile usage is receivable to supplement the written agreement on the hypothesis that some of its terms were implied or understood or unwritten, such evidence cannot be admitted to contradict the positive stipula-

1. *Stultz v. Dickey*, 5 Binn. 285, foll. in *Pradyote Kumar v. Gopi Krishna*, *supra*.

2. *Buzdul Karim v. Sattish Chandra*, 18 Cal. L. J. 418, 424.

3. *Mana Vikrama v. Rama Pater*, 20 Mad. 275.

4. *Pradyote Kumar v. Gopi Krishna*, 37 Cal. 222=11 Cal. L. J. 209.

5. *Price v. Browne*, 14 Mad. 420, 424.

6. *Volkart Bros. v. Vettivel*, 11 Mad. 459, 462.

7. *Lakurka Coal Co. v. Jamnadas*, 23 C. L. J. 514=33 L. C. 838.

8. *Holmes Wilson v. Bata Kishore*, 54 Cal 546; See also *Ruttonal Runji v. Bombay United & Spinning Co.*, 41 Bom. 518, 538, 540.

tions in the written agreement,¹ and it is equally inadmissible whether the defendant was aware of it or was ignorant of its existence.² Such evidence is only receivable when the incident which it is sought to import into the contract is consistent with the terms of the written instrument. If inconsistent, the evidence is not receivable and the inconsistency may be evinced by the express terms of the written contract and by the implications therefrom.³ Hence it follows that a usage inconsistent with a contract does not bind the parties thereto or become admissible in evidence merely because the parties are aware of it.⁴

The question whether, in order to affect a person with a usage of trade, the usage should be known to the party to be charged, is an important one and needs to be carefully examined. In *Kirchener v. Venus*⁵ when delivering the judgment of their Lordships of the Privy Council, Lord Kingsdown said: "When evidence of the usage of a particular place is admitted to add to or in any manner to affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognizant of the usage, and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it." With regard to this case Kelly C. B., in *Buckle v. Knoop*,⁶ said—"It only proves that people in Liverpool may well be supposed to be ignorant of rules in existence on the other side of the world, at Sydney; they are not in such a case required to know them. But here the contract is entered into between merchants of London and Liverpool, cognizant of the Bombay trade, and it relates to a subject matter connected with London, Liverpool and Bombay. Under these circumstances, a customary interpretation of the contract may be proved, although no proof be given affirmatively that one of the parties had heard or knew of the custom." And Channell B., said—"It is contended that the evidence (of usage) was improperly admitted, because it was not shown affirmatively that both parties to the contract were aware of the usage, and in support of that contention the case in the Privy Council *Kirchener v. Venus* was cited. But the objection merely amounts to this that the evidence was inadmissible because it was incomplete for want of other evidence, showing that the usage was known to both parties. That is an objection rather to the weight of evidence than to its admissibility." In *Sutton v. Tatham*⁷ a case decided in 1839, it was held that a person employing a broker on the London Stock Exchange impliedly gives him authority to act in accordance with the rules there established, even the principal is himself ignorant of such rules. This rule was subsequently

Is knowledge of the usage necessary

1. *Chundammull v. National Bank of India*, 51 Cal. 43; *Holmes Wilson v. Bata Kishore*, 1927 Cal. 668—54 Cal. 549=109 I C 268.
2. *Holmes Wilson v. Bata Kishore*, 1927 Cal. 668; see also 41 Bom. 518.
3. *Smith v. Ludha*, 17 Bom. 129; *Wilson v. Bata Kishore*, supra.
4. *Wilson v. Bata Kishore*, supra; see *Mottra's Indian Contract Act*, 2nd Edn., pp. 14 and 15.
5. 15 Moo., P. C. 361. (399).
6. L. R., 2 Ex., 125, (129).
7. 10 A. & E., 27.

approved in *Bayliffe v. Butterfield*.¹ In this case, however, the question whether the principal must be cognizant of the usage was not definitely decided. The rule laid down in *Sutton v. Tatham* was approved by Bovill C. J. also in *Grissel v. Bristowce*.² and appears to have been followed or adopted in numerous cases.³ But in the year 1875, the case of *Robinson v. Mollet*,⁴ came before the House of Lords, which dealt with the particular usage of the London tallow market. The question for consideration was whether the appellant was bound by a custom as to brokers existing in that market of which he was ignorant, merely by the employment of the respondents as his brokers to buy for him and their purchase in the London market of the quantity of tallow ordered. The following rules may be deduced from this decision:—

1. That if a principal employs a broker to act for him on a market with the usages of which he is unacquainted, he authorises the broker to make contracts upon the footing of such usages, provided they are such as to regulate the mode of performing the contract and do not change its intrinsic character.

2. That if the principal is aware of such usages, and chooses to employ a broker to act for him without restricting him, he will be bound by such usages.

3. But, that where the usage is of a peculiar character, and is so inconsistent with the nature of contract to which it is sought to be applied, as to change its nature altogether or to change its intrinsic character, it will not be binding upon a principal ignorant of such usage.

It has been held that a principal ignorant of usage is not bound where it is unreasonable. In *Perry v. Barnett*,⁵ the master of the Rolls, when speaking of the contention raised that a principal (who in that case was found to be ignorant of the usage of the London Stock Exchange) was nevertheless bound by the usage as he had employed the broker to deal for him on the London Stock Exchange, as being assumed to know such usages said:—“Now the proposition that a person who directs another to deal upon a particular market is to be treated as if he knew the rules of that market, has been adopted in the law to some extent, but certainly not to this extent, that however unreasonable or illegal they may be, he is still to be treated as if he knew them. There is a line of demarcation between rules by which he is not bound, and the rules of the Stock Exchange applicable upon this occasion would seem to come within the latter of these.” His Lordship further on added—“therefore, adopting the rule I laid down in *Robinson v. Mollete*, and which seems to comprise the rule in *Neilson v. James*,⁶ I am of opinion that even though it be proved as a

1 1 Exch. 425.

2 L. R., 3 C. P., 127; L. R., 4 C. P. 36.

3 *Taylor v. Stray*, 2 C. B. N. S. 175; *Stray v. Russell* 1 El. & El. 888. *Groten v. Legge*, 2 H. & N. 210, 216. *Lloyd v. Guibert*, 33 L. J. Q. B. 241; *Duncan v. Hill*, L. R. 8 Ex. 242; *Cuthbert v. Cumming*, 10 Exch. 806; *Lacey v. Hill*, L. R. 8 ch. 921.

4 L. R., 7 H. L. 802.

5 L. R., 15 Q. B. D., 388, 393, 394, 395.

6 L. R. 9 Q. B. D. 546.

matter of fact that there exists such a rule on the London Stock Exchange as to that which I have alluded, viz., the usage set up in the case, it would be wrong to say that the defendant who was ignorant of it, ought to be treated as if he knew it, merely because he instructed the plaintiffs to deal upon the "London Stock Exchange." And Beggalley L. J., also said in that case:—"Then it was urged that if the defendant gave the plaintiffs authority to purchase on the London Stock Exchange he was bound by the rule of the Stock Exchange as to such purchase. But in my opinion, the defendant was only bound by such rules as were reasonable and proper rules. That point was distinctly recognized in *Neulson v. James*."

But where the usage is one which treats as a valid legal contract for one person that which is no legal contract at all, and which could not be enforced in law against the other contracting party, it has been held that knowledge of the alleged usage is essential. In *Perry v. Barnett*,¹ where the question was whether a person, not a member of the Stock Exchange, or acquainted with its customs, but an outsider, was bound by such a custom without knowledge: Grove J. said: "I am of opinion that he is not, I think that if a person, to use the language of Lord Chelmsford in *Robinson v. Mollet*,² employs a broker to transact for him upon a market with the usage of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts, and do not change their intrinsic character. It seems to me impossible to say that in this case the alleged usage does not change the intrinsic character of the contract. The usage appears to me to be one which treats as a valid contract for one purpose that which is no legal contract at all, and one which the defendant could not enforce in law against the other contracting party. The authority given to the broker is to buy so many shares in the Oriental Bank. The broker instructs his agent on the Stock Exchange, who forwards a note which would, to any one unacquainted with the practice of the Stock Exchange, appear to be a note of legal contract which the buyer could himself enforce against a seller, but it appears that in fact, in consequence of non-compliance with the provisions of the Leeman's Act, no valid contract has been effected at all, and therefore the buyer could not, if the shares had risen in value, and the seller had repudiated, have enforced this contract against him at law. It seems to me, under these circumstances that he does not get what he bargained for. But then it is said that there is a usage on the Stock Exchange, not by which the broker employed by the purchaser may be made personally responsible on the Stock Exchange upon such contract. If the purchaser knew of that, and if he contracted with his agent on that basis, he may be held to be liable, as was done in the case of *Read v. Anderson*,³

1. L. R. 14 Q. B. D. 467.

2. L. R. 7 H. L. 802. (1836).

3. L. R. 13 Q. B. D. 779.

because he has knowingly changed the position of the agent and made him subject to certain liabilities in consequence of his carrying out an order in the manner in which the person giving the order knew that it would be carried out. But if the purchaser is ignorant of the usage, and thinks when he authorises the broker to effect a contract, that a contract means a contract enforceable at law, can it be said that he is to be affected by that which is not a contract and is not enforceable at law? It seems to me that on this ground there is a broad distinction in this case and *Read v. Anderson*. In the case of *Read v. Anderson*, Bowen L. J., in delivering the judgment of the majority of the Court of Appeal, expressly bases his judgment on the fact that by the usage known to both the parties the letting agent became liable; and in that case not only was the usage taken to be known to both the parties but the plaintiff had actually effected that which he was authorised to effect. He was not commissioned to make a contract but a bet, and I do not think in that case it would be far-fetched to assume that the person employing the agent did know that a bet was void at law, because that is common knowledge." In *Seymour v. Bridge*,¹ where the selfsame usage was in question, but where it was assumed throughout as the basis of the judgment that the principal did know, or was taken to have known, of the usage; Mathew J., held on the authority of *Read v. Anderson*, that the broker was entitled to recover. But in all cases, it must be remembered that a custom if unreasonable is not binding, and that the knowledge of the person to be bound may be an important element in deciding whether a custom is reasonable or not.²

Under the American law it has been held that where the usage is a purely local or particular one the principal may ordinarily repel this presumption of knowledge by showing that in fact he had no notice of it.³ Where, however, an agent, for example, a broker or factor, is authorised to deal in a particular place or market, as upon a certain stock exchange, at which particular rules or usages prevail, it is presumed, in the absence of evidence to the contrary, that the principal expected and intended that the agent should conform to such rules and usages, although in fact the principal may have been ignorant of what they were. This is upon the ground that the principal, as a reasonable man, must have anticipated that such rules and usages were likely to prevail, and therefore must have authorized the dealing in contemplation of them, where no contrary intention was disclosed.⁴

Such usage may operate to limit as well as enlarge the authority of an agent,⁵ but where the principal relies upon custom to impose restrictions he must show that it was so

1 L. R. 14 Q. B. D. 460

2 *Perry v. Barnett*, L. R. 15 Q. B. D. 397, see Pearson's Law of Agency in British India pp 119 to 126, see also *Hobbes Wilson v. Bala Kishore*, 1927 Cal. 668 cited at p.

3 See Katlar, p 142 and authorities cited therein

4 Mechem, § 716 and authorities cited therein, see Katlar, p. 143

5 Mechem, §. 716

universal that the other party can well be presumed to have known of it.¹

It is thus clear that any usage which is unlawful does not operate to confer any implied authority upon the agent, nor any usage which is unreasonable does so. In the latter case, however, if the principal had notice of such usage at the time when he conferred the authority he may be presumed to have contemplated it, and the agent may bind the principal by acting on even such usage.² The question whether any particular usage or custom is unlawful or unreasonable is a question of law.

A usage or custom which changes the intrinsic character of the contract of agency,⁴ or whereby an agent, who is authorised to receive payment of money, may receive payment by way of set-off or by way of a settlement of accounts between himself and the person from whom he is authorized to receive such payment on behalf of the principal⁵ is reasonable. Where, however, the usage or custom is valid in other respects, the mere fact that the principal was unaware of its existence does not affect its binding nature.⁶

It may be observed that any such usage may operate to limit as well as enlarge the authority of an agent,⁷ but where the principal relies upon custom to impose restrictions he must show that it was so universal that the other party can well be presumed to have known of it.⁸ Usage, however, as already noted, cannot operate to change the intrinsic character of the relation, nor will it be permitted as between the principal and the agent, or as between the principal and third persons having notice of them, to contravene express instructions,⁹ or to contradict an express contract to the contrary.¹⁰ An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise,

1. *Bentley v. Doggett*, 37 Am. Rep. 827

2. See also *Campbell v. Hassel*, 1 Stark. 233; *Pollock v. Stables*, 12 Q. B. 785; *Bostock v. Jardine*, 34 L. J. Ex. 142; *Scott v. Godfrey*, (1901) 2 K. B. 726; *Hamilton v. Young*, L. R. 7 Ir. 289; *Beckhousen v. Hamblett*, (1901) 2 K. B. 73; *May v. Angulis* 14 T. L. R. 551; *Consolidated Goldfield v. Spiegel*, 100 L. T. 351; *Ex parte Rogers Re Rogers*, 15 Ch. D. 207; *Bhagwandass Narotamdas v. Kanji Dooji*, 30 Bom. 205; *Chandulal Sukhlal v. Sidhruthrai Soojanrai*, 29 Bom. 291; *Kidardmal Bhuramal v. Surajmal Garindram*, 33 Bom. 364=9 Bom. L. R. 903; *Fakirchand Lalchand v. Doolub Garindji*, 7 Bom. L. R. 213.

3. See Bowstead, Art. 41, p. 70.

4. *Hamilton v. Young*, L. R. 7 Ir. 289

5. *Sweeting v. Pearce*, 7 C. B. N. S. 799; *Burlett v. Pentland*, 10 B. & C. 760; *Stewart v. Aberdeen*, 4 M. & W. 211; *Scot v. Irving*, 1 B. & Ad. 605; *Watrieff v. Grosfield*, 51 W. R. 365; *Pearson v. Scott*, 9 Ch. D. 168; *Blackburn v. Mason*, 68 L. T. 510 C. A.; *Anderson v. Sutherland*, 13 T. L. R. 163

6. *Cropper v. Cook*, L. R. 3 C. B. 1914.

7. *Mechem*, §. 716.

8. *Bentley v. Doggett*, 37 Am. Rep. 827.

9. See *Barkdale v. Brown*, 9 Am. Dec. 720; and other American authorities cited at p. 143 of Katiar's Law of Agency.

10. *Brown v. Foster*, 113 Mass. 136; *Katiar*, p. 143.

if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.¹ The subject will be dealt with under the heading 'agent's duty to principal.'

Instances of
reasonable
custom &
usages.

The following customs and usages have been held to be reasonable under the English law :

1. A was authorised to sell manure. The jury found that it was customary to sell manure with a warranty. Held, that A had implied authority to give a warranty on a sale of the manure.
2. A is authorised to sell a certain class of goods. It is customary to sell goods of that class on credit. A has implied authority to sell the goods on credit.³
3. A custom among bill brokers in London to raise money by depositing their customers' bills *en bloc*, brokers alone being looked to by the customers, and the parties contracting in reference to such custom.⁴
4. A broker, a member of the Stock Exchange, is authorised to sell certain bonds. He has implied authority, if it be discovered that the bonds are not genuine, to rescind the sale and repay the purchaser the price, in accordance with the usage of the Stock Exchange.⁵
5. A usage among the stock brokers authorized to buy or sell or carry over shares or stock to execute the order by means of several contracts, or to execute any portion or portions of it.⁶
6. A custom in Liverpool whereby a broker authorized to buy wool may buy it in his own name or in the name of his customer without giving the customer even any notice that he bought it in his own name or not.⁷
7. A broker is authorised to buy 50 tons of tallow. It is customary in the tallow trade for a broker to make a single contract in his own name for the purchase of a sufficiently large quantity of tallow to supply the orders of several principals, and to parcel it out amongst them. The broker has no implied authority to purchase a larger quantity than 50 tons and allocate 50 tons thereof to the principal, unless the principal was aware of the usage at the time when he gave the authority, because the effect of such a usage is to change the intrinsic character of the contract of agency by turning the agent into a principal, and thus giving him an interest at variance with his duty.⁸

1. S. 211, Indian Contract Act, 1872.

2. *Dingle v. Hare*, (1859), 7 C. B. (N. S.) 145.

3. *Pelham v. Hilder*. (1841), 1 Y & Coll. C. C. 3=57 R. R. 208.

4. *Foster v. Pearson*, 4 L. J. Exch. 120.

5. *Young v. Cole*, (1837), 3 Bing. N. C. 724=43 R. R. 783

6. *Young v. Cole*. 3 Bing. N. C. 724.

7. *Cropper v. Cook*, (1868), L. R. 3 C. P. 194. See, however, *Robinson v. Mollett* (1874), L. R. 7 H. L. 802 and *Bostock v. Jardine* (1865) 34 L. J. Ex. 142; where a similar usage has been held to be unreasonable because it tends to change the intrinsic nature of the contract of agency.

8. *Robinson v. Mollett*, *supra*. *Bostock v. Jardine* *supra*.

8. Any usage of the stock exchange whereby a broker who is instructed to buy or sell or carry over shares in the same undertaking, may make one contract in his own name for the total number of shares and apportion them amongst the principals, and may include in the contract shares in which he is dealing in his own account; and thereupon the jobber with whom he deals and each principal become bound to carry out such portion of the contract as is appropriated to them respectively. In this case although in form there is only one contract in effect there are separate contracts between the jobber and each principal on which they sue and be sued.¹

The following are instances of unreasonable customs and usages :—

Instances of unreasonable customs and usages.

1. A broker is authorized to sell stock. A custom of the Stock Exchange, whereby he is himself permitted to take over the stock at the price of the day if he is unable to find a purchaser, is unreasonable, and such a transaction is not binding on the principal unless he is proved to have had notice of the custom.²
2. An insurance broker is authorised to receive from the underwriters payment of money due under a policy. A custom at Lloyd's whereby the broker may settle with the underwriters by way of set-off is unreasonable, and the principal is not bound by such a settlement unless he was aware of the custom when he authorized the broker to receive payment. The same rule applies to stock brokers settling with agents.³

According to the custom of trade in Bombay, when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe, at a fixed price, net free godown, including duty, or free Bombay harbour, and no rate of remuneration is specially mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant.⁴

Custom of trade in Bombay

There is a custom of the Bombay Silver Market for forward contracts that only shroffs are the ostensible buyers and sellers, though shroffs may have and often do have outside principals for whom they are acting. The shroffs, when acting for principals, work sometimes for *kachhi adat* and sometimes for *pakki adat*. In the case of *kachhi adat*, the *adatia* shroff

Bombay Silver Market.

1. *Scott v. Godfrey*, (1901) 2 K. B. 726; *Beckhuson v. Hamblett*, (1901), 2 K. B. 73; See also *Exp. Rogers, re Rogers* (1880), 15 Ch. D. 207. C. A.; *May v. Angeli* (1898), 14 T. L. R. 551, H. L.; *Consolidated Goldfield, v. Spiegel* (1909), 100 L. T. 351.
2. *Hamilton v. Young*, (1881), L. R. 7 Ir. 289, Ir.
3. *Sweeting v. Pearce*, 7 C. B. N. S. 449; *Todd v. Reid*, 4 H. & A. 210; *Buellett v. Pentland*, 10 B. & C. 760; *Stewart v. Aberdeen*, 4 M. & W. 211; *Scott v. Irving*, 1 B. & A. 210; *Matrief v. Crossfield*, 51 W. R. 365.
4. *Paul Beir v. Chotalal Javerdas* (1906) 30 Bom. J.

guarantees the performance of the contract to the other shroff but does not guarantee its performance to his own principal. In the case of *pakki adat*, the *adatia* shroff, who then acts for a higher rate of commission, is liable as principal both to his own employer and to the other shroff. This custom whereby only shroffs are the ostensible parties is observed for two reasons agreeable to the Marwari shroffs; first, that on every forward silver transaction a commission becomes payable to one or both of the Marwari shroffs; and, secondly, that the *adatia* shroff guarantees to the other shroff performance of the contract. There is no such custom, however, that the selling shroff is not personally liable to the principal of the buying *adatia*. Thus if A enters into a contract in the name of his *kachha adatia* H whereby H agrees to buy and S agrees to sell silver bars for the ensuing *vaida*, A is entitled to demand performance of the contract from S.¹

Usage of the
Bombay
Market
known as the
pakki adat
system

A reference has already been made to '*adattias*' or '*arhattias*' and '*pakki* (*pacci*) *arhat*' and '*kachhi arhat*'.² Usage of the Bombay market known as *pakki adat* (or *arhat*) system was noted in *Bhagwan Das v. Kanji Deoji*.³ In that case the plaintiffs in Bombay bought and sold in Bombay cotton and other products on the orders of the defendant who traded at Shahada in Khandesh. In respect of the transactions sued on the plaintiffs before due date had entered into cross contracts of purchase with the merchants to whom they had originally sold goods on the defendant's account. The transactions were entered into on *pakki adat* terms. The following were held to be the incidents of the contract entered into on *pakki addat* terms:—

1. The *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant, and no contractual privity is established between the up-country constituent and the Bombay merchant.

2. The up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross-contracts with the Bombay merchant, either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

3. The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

The relation between the *pakka adatia* and the up-country constituent is not the relation of agent and principal pure and simple. The precise relation may thus be described in the words of Jenkins C. J.:—

"I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the conclusion that the contract of a *pakka adatia*, in circumstances like the present, is one whereby he undertakes or, to use the words in its non-technical sense as

1. *Abraham v. Sarupchand* (1917) 42 Bom. 224=41 I. C. 256.

2. See notes on pages 50, 51.

3. I. L. R. (1906) 30 Bom. 205, in appeal from (1905) 7 Bom. L. R. 57.

business men on occasion do use it, guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid; in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference.

"I do not say that there is no relation of principal and agent between the parties at any stage; there may be up to a point, and that this is legally possible is shown by Mellish L. J. in *Ex parte White*¹ where he speaks of 'a person who is an agent up to a certain point.' So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when this stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated. Into this contract there is imported by the evidence of custom no such element of unreasonableness as would compel us to reject it on that score."

The *pakka adatia* is thus virtually a principal entering into an independent contract with the up-country constituent. In case of the covering contract also (where one exists) he stands in the same relation to the Bombay merchants, in which covering contract of course the up-country constituent has no privity. In *Manilal Raghunath v. Radhakisson Ramjiwan*² Macleod C. J. said the only distinction between a *pakka adatia* and broker who is liable on his contracts is that the former does not contract as agent, but as principal; in other words, the *pakka adatia* undertakes business for his principal, but the particular contracts by which he carries out that business are his own affair.

Where the plaintiff on a constituent's instructions buys a particular number of bales of cotton at a given price, and later on his instructions sells a similar number of bales at the same price, then as between the constituent and the plaintiff, the former's liability on the first contract is treated as balances and adjusted. To speak of these contracts of sale and purchases as being "cancelled" is perhaps not accurate; but what is meant is that a contract of the one class is followed by a contract of the other, having the effect of cancelling and reducing liability on the first.³

In *Ram Gopal Parasram v. Uggersain Purshotamdas*⁴ also it has been held that a *pukka adatia* is an agent of his constituent only for the purpose of ascertaining the price at which the order is to be completed. After the price has been ascertained, he ceases to be an agent and assumes towards his constituent the character of a principal.

1. (1870-1871) L. R. 6 Ch. 397, at p. 403.

2. (1920) 45 Bom. 386=62 I. C. 361

3. *Chandulal Sukhlal v. Sidhruthrai-Soojanrai*, (1905) 209 Bom. 221=7 Bom. L. R. 165. See also *Kedarmal Bhuramal v. Surajmal Govindram*, (1907) 33 Bom. 364.

4. A. I. R. 1942 Sind 115=201 I. C. 513.

Where an order has been given and accepted, the constituent and *pakka artia* stand to one another in the relation of principals: there is no relationship of principal and agent such as would justify a demand by the constituent of an account. The only claim which can be made by a constituent against a *pakka artia* is for a liquidated sum. The calculation of the sum in no sense involves accounting by the *pakka artia*; it is a matter of the application of simple arithmetical methods to facts within the knowledge of both sides.¹

A *pakka adatia* is entitled to demand margin money before he enters into any transaction, whether an independent transaction or a transaction by way of a covering transaction.² There are three courses open to a commission agent to secure the payment of the full amount of the premium. He can insist on payment of the whole premium in advance, or he can take security for payment on the due date, or he can demand margin against the fluctuation in the rate of premium. If he has failed to adopt either of the first two courses and finds that the transaction if closed as on a particular date for want of margin, his own liability to his broker would be reduced, he is entitled to call upon the constituent to pay sufficient margin so as to secure the payment of the whole of the moneys which may be due to him on the due date including the premium, and in default of payment to close the outstanding transaction.³

The position of a *pukka artia* is not of an ordinary agent who merely brings about a transaction between third parties for he becomes personally responsible since both the buyer and the seller look to him for fulfilment of their contract. If the original seller fails to fulfil the contract the *pukka artia* can claim damages from him.⁴

In *Chhogmal Balkisandas v. Jainarayan Kaniyalal*⁵ also it has been held that there is no obligation on the part of a *pakka adatia* to find buyers or sellers. As between him and his up-country constituent the business is finished when an order for purchase or sale is accepted, such acceptance apparently being affected by an entry in the Soda Nondh. Whether the *pakka adatia* takes the risk himself by selling again is entirely within his discretion. The selling client cannot claim as of right the benefit of any covering contracts entered into on the same day as his sales.

It was further held that the legal relationship between the client and the *pakka adatia* is that of vendor and purchaser, whether the contract is written or oral, or whether an order is sent by telegram and accepted by the *adatia*. The *adatia* is entitled to charge commission and brokerage in addition to the

1. *Balkrishna & Co v. Ram Nath Sasghal*, A I R, 1940 Lah 195, case—law reviewed, also *Jot Ram v. Jnan Ram*, A I R 1932 Lah 633=139 I C 637 (*pakka adat* contrary to public policy) and not unreasonable and did not involve a conflict between the *pakka artias'* interest and duty.

2. *Sakarbhau v. Ramniklal*, A I R. 1932 Bom 328=34 Bom L R 709=138 I. C. 244

3. *Ibid.*

4. *Jot Ram v. Jnan Ram*, 1932 Lah. 633=139 I C 637=33 P L R 985

5. 15 Bom L R 750

price. If the client sends goods for the due date the *adatia* is responsible for the price whether he has covered himself or not.

Also, that there is no privity between the client who gives orders to a *pakka adatia* and the persons who buy and sell from and to the *pakka adatia*; the existence of the latter can only be relevant if it affords an indication of the intention of the *pakka adatia* at the time of his accepting the client's order. Even then, it does not follow as a matter of course that because the *pakka adatia* intended to do genuine business with his buyers and sellers he also intended to do genuine business with his clients.

Technically speaking, a seller may be said to deliver goods to his buyer by giving him a delivery order on a certain person from whom the buyer may obtain goods on paying the price, but just as contracts in the usual mercantile firm may be used for the purpose of transactions for payment of differences only so also delivery orders which appear on the face of them to be of an unimpeachable character may be used and pass from hand to hand amongst a succession of persons who have no intention whatever of making use of such delivery orders or of doing anything also beyond adjusting differences between themselves.

In *Bhagwandas v. Burjorjee*,¹ the defendant employed the plaintiffs as his *pakka adatias*, and entered with them into one forward contract for the sale of 2,000 bales of Broach Cotton and three more such contracts for the sale of 4,000 tons of linseed. As security against the business, he gave them Rs. 61,000 to be retained at interest. The plaintiffs dealt in actual sales of linseed on an average of 150 tons a year. The cotton contract yielded, without any delivery taking place, a profit of Rs. 5,800 odd, which the plaintiffs placed to the defendant's credit. The plaintiffs entered through brokers into thirty-nine sub-contracts by way of cover against the defendant's linseed contracts. The sub-contracts contained the condition "not to be delivered to N. R. Co.," a firm that always insisted on delivery of produce contracted for. In fulfilment of his contract, the defendant actually delivered only 300 tons of linseed, which appeared to have been made only for the purpose of shewing, in case the matter went into Court, that the transactions were not of a wagering character. The sub-contracts were settled by the plaintiffs on payment of differences. To recover the loss thus occasioned the plaintiffs sued the defendant. The defendant contended that the transactions were of a wagering character. *Held*, that a *pakka adatia* is a commission agent and something more. He receives orders from his constituents and places them in the open market. His obligations are briefly to find money for goods or goods for money or settle differences on due date. A peculiar feature of his is that he can allocate his principal's contracts to himself when it suits him to do so. Where a *pukka adatia* who has been compelled, owing to default of his client on one side or the other, either to find goods or money, seeks to recover from that defaulting client the amount he has been obliged to pay on his account, it becomes on the face of it

1. 15 Bom. L. R. 85.

almost impossible to say that as between him and his client any defence of wagering could succeed.

The above decision was, however, reversed in *Burjorji v. Bhagvandas*¹ holding that the sub-contracts considering their conditions were not sufficient indication of an intention on the part of the plaintiffs to call for delivery from the defendant, while other circumstances in the case pointed to the conclusion that the common understanding between the plaintiffs and the defendant was that they should deal in differences.

Whether a
wagering
contract.

It has thus been held that as regards his constituent the *pakka adatia* is a principal and not a disinterested middleman bringing two principals together, and consequently a transaction between a *pakka adatia* and his constituent may be by way of wager like any other transaction between two contracting parties, and the existence of the *pakki adat* relationship does not of itself negative the possibility of a contract being a wagering contract as between them.²

When a constituent places an order with *pucca arhti* to sell or buy for forward delivery, the *pucca arhti* can either appropriate or allocate the order to himself or enter into a contract with another merchant in pursuance of the order. In either case, the constituent looks to the *pucca arhti* alone and regards his order as a contract with him as if he (*pucca arhti*) were so far as the constituent is concerned, the principal. Where the *pucca arhti*, instead of allocating the order to himself enters into a contract with another merchant, the constituent never inquires who the merchant is and the *pucca arhti* never gives the name of the merchant to the constituent. The reason is that the constituent and the merchant have nothing to do with each other; each regards his transaction as one with the *pucca arhti* as the principal responsible to him. As an incident of this relationship, the *pucca arhti* is entitled in such a case to enter into a cross-contract before the due date with the same merchant either on his own account or in pursuance of an order from another constituent. In neither case is the *pucca arhti* bound to substitute another contract, for the first contract entered into by him in fulfilment of the order of the original contract; and in either case the *pucca arhti* is entitled, without any such substitution, when the due date arrives, to give delivery, if the order was to sell, or to take delivery if the order was to buy, and to pay or receive differences, as the case may be.³

Lyallpur and
Amritsar
markets

It has been held that a custom is well settled both in the Lyallpur and Amritsar markets that if the market is going down and the deposit is found to be insufficient the *arhti* can

1 15 Bom. L. R. 716=I. L. R. 38 Bom. 204; See also *Bhagvandas v. Burjorji*, (1918) 45 I. A. 29=42 Bom. 373 in which the decree was reversed by the Privy Council, taking a different view of the facts, but the principal laid down by the Bombay High Court was affirmed.

2 See also *Manilal Rayghunath v. Radha Kisson Ramjivan*, (1921) 45 Bom. 386; *Harcharandas v. Jai Jai Ram* 1940 All. 182; *Ram Gopal v. Uggarsem* 1942 Sind 115; *Ram Krishna Das v. Mutsuddilal*, 1942 All. 170

3 *Pirom Lala Ganpat Mal Sundardas v. Firm Bhai Kher Singh—Balwant Singh*, A. I. R. 1937 Lah. 581

make a demand from the purchaser for a further deposit, and it is only if the latter fails to comply within a reasonable time that the *arhti* is competent to settle the transactions.¹

Under the *kachchi adat* system, when an *adatia* receives an order from an up-country constituent for the sale or purchase of cotton, he sends for a broker and settles the rate with him. The rate so settled² becomes from that moment binding upon both the *adatia* and the broker, and the broker remains personally bound until he brings a party willing to take up the contract. The broker in such a case adopts one of two ways: he either procures a party willing to take up the contract and introduce him to *adatia*, and the party and the *adatia* thus exchange *kabalas* (contracts) with each other; or, where the broker has got a contract of his own ready, he agrees to transfer it to the *adatia* and brings together the *adatia* and the other party to his (*broker's*) contract, and these two then exchange *kabalas* with each other. If, when the party is brought to the *adatia*, the market rate is the same as the rate settled by the *adatia* with the broker, the broker gets nothing beyond his commission. If the market rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. There is nothing unreasonable in such usage.³

Usage of
kachchi adat
system in
cotton
business in
Bombay
market.

34. Authority inferred from an established course of dealings in the particular business.

Allied to the subject of 'implied authority by custom or usage' is the subject of implied authority arising from an established course of dealings in a particular trade or business. Every trade or business conducted according to certain rules, which are often not written and not embodied in any Code of Law, still by their continued use have obtained the sanction of the public opinion and have become so much commonly known among the people carrying on such trade or business and among the persons who deal with them that whenever an agent is authorized to conduct such trade or business in general terms without any specification suggesting a digression from an ordinary course, such agent and everybody who comes to know of such appointment can reasonably infer that he is to conduct it according to those rules. In fact, these rules form the unwritten code of such a trade or business which everybody who enters into it must follow. An agent therefore appointed to conduct a trade or business has implied authority to

1. A. I. R. 1937 lah. 581.

2. It is necessary to do so as the rates fluctuate constantly in the market, which may rise or fall every two minutes.

3. *Fakir Chand Lal Chand v. Doolub Gorindji* (1905) 7 Bom. L. R. 213. As to the discretion to call for margin in the Bombay Cotton Market, *Desai v. Bhikam Chand*, (1926), 29 Bom. L. R. 147=100 I. C. 993=A. I. R. 1927 Bom. 125.

conduct it in the mode and according to the rules ordinarily followed in such trade or business.¹

The methods of dealing of the particular principal are also material in this connection inasmuch as they are sometimes a very material factor in determining the extent of the authority of the agent. The continued conduct of the principal, besides working up an estoppel against him in certain cases may be used to show how a grant of power was intended to be interpreted. The voluntary acquiescence of the principal in the known course of conduct of the agent may serve to show that such conduct was in fact authorized.² This does not depend upon estoppel but is an inference of fact to be drawn from conduct. It is, therefore, not essential—as in cases resting upon estoppel—that the other party shall have known of the facts at the time and relied upon them, but he may, as in other cases of actual authority, prove the authority though he was ignorant of it at the time of the act.³

“Normally,” observes Justice Pinney, “an agency arises from some conduct or other transaction or transactions that are between the principal and the agent and not ordinarily known to outside parties, and a third party is entitled to hold the principal on a contract made by the agent in the name of the principal even though the party does not at the time of making the contract know the particular course of the agent’s authority. In cases of this class before us the third party when litigation necessitates proof of the agency, may adduce evidence of the customary exercise by the alleged agent of the authority appropriate to such an agent under circumstances that give rise to the inference of knowledge and acquiescence on the part of the principal—not necessary to show that the principal is estopped in favour of the third party to deny the agency, but rather to show that such agency was in fact created.”⁴

In the cases of the professional agents we must look to the established course of dealings in the particular profession in order to determine the full extent of their authority. In the cases of other agents we are to look to the established course of dealings by such agents acquiesced in by the principal or to the established course of conduct of the principal in dealings with such agent which leads a reasonable man to the inference as to what authority was conferred by the principal.⁵

35. Authority by necessity or urgency.

An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as

1. See *Meehem*, 8. 717 ; *Katiar*, p. 146.
2. *Ratiar*, p. 147, citing *Murphy v. Cane*, N. J. L. 82 Atl. 854 ; *Blake v. Domestic Manufacturing Company*, 34 N. J. Eq. 480 ; *Fifth Ward Savings Bank v. First National Bank*, 48 N. J. L. 513.
3. *Murphy v. Cane*, *supra* ; *Blake v. Domestic Manufacturing Co.* *supra*.
4. *Murphy v. Cane*, *supra*.
5. See *Katiar*, p. 148.

would be done by a person of ordinary prudence, in his own case, under similar circumstances.¹

ILLUSTRATIONS.

- (a) An agent for sale may have goods repaired if it be necessary.
- (b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

(S. 189, *Indian Contract Act, 1872*).

A reference has already been made to an implied authority of a master of a ship in cases of emergency. Thus the master of a ship may sell the goods of an absent owner in case of necessity when he is unable to communicate with the owner and obtain his directions.² But the manager of a business which does not include borrowing money as part of its ordinary course has no implied authority to borrow money on his principal's credit to carry on the business, even if the money is urgently needed.³ When however it is said "that the authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent,"³ it seems that this goes too far.⁴

Illustration (b) above seems to be suggested by Story's opinion that "if goods are perishable and perishing, the agent may deviate from his instructions as to the time or price at which they are to be referred to."⁵ Accordingly, it has been held that a seller of goods who cannot deliver the goods owing to war conditions can resell them purporting to act as the original purchaser's agent of necessity.⁶ It has also been held that a parent is an agent of necessity to arrange and prepare a marriage settlement of an infant child, and the child need not be separately represented by an independent legal adviser.⁷

It may be stated as a rule that generally it is the duty of an agent, in cases of emergency, to use all reasonable diligence in communicating with the principal, and in seeking to obtain his instructions.⁸ But there may arise a case in which it is not possible to do so without loss or detriment to the principal.

1. But see S. 214 of the *Indian Contract Act, 1872*, which prescribes that it is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instruction.
2. *Australasian Steam Navigation Co. v. Moore* (1872), L. R. 4 P. C. 222. Whether there is such urgent necessity as to give no time or opportunity for communicating with the owner is a question of fact. *Acetos v. Burns* (1873) 3 Ex. D. 282; See notes on page.
3. *Hartayne v. Bourne* (1841) 7 M. & W. 595, 600-56 R. R. 806, 810, apparently overlooked in *Dhanpat Rai v. Allahabad Bank*, (1926), 12 Luck. 253=1927 Oudh 44; (See notes on page) ; followed by *Cunningham & Co.* (1887) 36 Ch. D. 532.
4. *Prager v. Blatspiel*, (1924), 1 K. B. 566, where the agent who sold goods as of necessity could not communicate with the principal, but the other requisite conditions of actual commercial necessity and good faith on the agent's part were not established. See *Pollock & Mulla*, p. 546.
5. Story on Agency, § 193.
6. *Prager v. Blatspiel* (1924) 1 K. B. 566.
7. *Tucker v. Bennett*, 38 Ch. D. 1.
8. S. 214, *Indian Contract Act, 1872*.

which can be avoided by the agent by acting on his own initiative. In such a case of supervening necessity or sudden emergency the law presumes an authority to act on the ground that the principal, if he had the opportunity to instruct or authorise the agent, would have adopted the same or a similar course as a reasonable and prudent man, or on the ground that as a reasonable man he would have approved the act of the agent if he had a previous notice. It is of course ordinarily for the principal to determine what shall be done in such cases of necessity or emergency as were not provided for by the original authorisation. He may prefer that nothing shall be done, or if some thing must be done, that the situation shall be met by means of his own devising. He certainly will be vitally interested in being informed of the situation and given an opportunity to deal with it himself. If, however, there be a real necessity or emergency, and the principal cannot be communicated with, because of the limitations of the time or place or means, and something must be done to protect the interest of the principal, authority to do a fair and reasonable act, apparently adopted to the needs, and not going beyond the demands of the occasion, may properly be implied.¹ In the words of Smith, L. J. the impossibility of communicating with the principal is the foundation of the authority of emergency.²

Liability to communicate with the principal is thus an indispensable condition.³ The need of action for the protection of the principal's interest must be apparently unquestionable.⁴ The means adopted to meet the emergency must not be extreme or fanciful or unreasonable, but such as a prudent man would adopt in his own case.⁵ The power must be prudently exercised and must not be carried beyond the real or apparent necessity.⁶ The act must go no further than to reasonably meet the emergency.⁵ As absolute necessity is the cause of the authority the implied authority ceases with the ceasing of the emergency. This necessity should be distinguished from the ordinary necessity of doing the business in the usual way, which has been already dealt with. It is not the necessity of dealing with a particular person in a particular way simply because we happen to be unwilling to deal upon any other basis, but a general necessity inhering in the situation or in the very nature of the case.⁶ Emergency, however, may conceivably operate to diminish rather than enlarge the authority in some cases, for it may not be in the interest of the principal that the agent should continue to exercise the whole authority conferred in spite of the emergency which requires some reservation to safeguard the interest of the principal.⁷

The implied authority of the master of ship or of the managing agent of a company in cases of necessity or in emer-

1. Mechem, §. 718 ; See Katlar, p. 148.

2. Per Smith, L. J. in *Guillan v. Trist*, 2 Q. B. 34.

3. *Ibid* ; see also *Hawtayne v. Bourne*, 7 M. & W. 595.

4. *Consolidated National Bank v. Pacific Coast Steamship Co.*, 95 Cal. 1.

5. *Tennessee Co. v. Kavanaugh*, 101 Ala. 1

6. See Mechem, §. 118.

7. See Mechem, §. 719 ; Katlar, p. 149.

gency has already been noticed.² Likewise, it has been held that a guard or superintendent of a railway station is not an agent of necessity authorised to employ a surgeon to attend passengers wounded by an accident and so the surgeon cannot recover his fees from the railway company,³ but the general manager of the railway company is such an agent.⁴ Section 189 of the Indian Contract Act, 1872, even authorises an agent to act contrary to the principal's instructions when a sudden emergency arises and when communication is impossible.⁵

A partner has authority in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm.⁶ This is a departure from the English law. The English Partnership Act contains no provisions enabling a partner to bind the firm by any act done in an emergency for the preservation of the business or property of the firm, when the act is not in accordance with the usual method of transacting business. In fact the law may be stated to be that the power to do what is usual does not extend to do what is unusual. Hence under the English law if there was no necessity, for example, to borrow money to carry on the business in ordinary circumstances and in ordinary manner the firm would not be liable for money borrowed by its agents under extraordinary circumstances as being absolutely necessary to save the property of the firm from ruin.⁷ Provision has been made in section 13 (e) (ii) for indemnity of a partner by his co-partners while acting in extraordinary circumstances.⁸

Partner's
authority in
emergency.

See also notes on pages 97 to 101 under the heading 'agent of necessity.'

36. Apparent authority.

A reference has already been made to the creation of agency by implication or estoppel.¹ The principal is bound to third persons by all those acts of the agent, which are apparently within the scope of his authority, although, in reality, they may be beyond it, for it is the apparent state of things by which alone they can measure such authority, the real state of things being generally within the special knowledge of the principal and agent and not always accessible to third persons. The authority conferred by the apparent state of things is generally known as apparent authority.

Apparent authority should be carefully distinguished from authority by estoppel, inasmuch as apparent authority is that which, though not really granted, the principal *knowingly* permits the agent to exercise, or holds him out as possessing,

1. See notes on pages 7.

2. *Cox v. Midland Ry. Co.* 18 L. J. Ex. 65.

3. *Walker v. G. W. Ry. Co.*, L. R. 2 Ex. 228.

4. *Dayton Price & Co., v. Rohamotallah & Co.*, 29 C. W. N. 422.

5. S. 21, Indian Partnership Act, 1932.

6. See *Hawthorne v. Bourne*, 7 M. & W. 595.

7. See *Moitra's Indian Partnership Act*, 2nd Edn. p. 78.

8. See notes on pages 77 to 86.

while agency or authority by estoppel arises in those cases where the principal by his conduct or culpable negligence permits the agent to exercise powers not granted to him even though the principal may have no notice or knowledge of the conduct of the agent.² Apparent authority is not founded on negligence of the principal, but in the conscious permission of acts beyond the powers granted, whereas the rule of estoppel has its basis in the negligence of the principal in failing properly to supervise and control the affairs of the agent.³

Apparent authority should also be distinguished from the express or declared authority, in-as-much as the apparent authority forms the basis of contract between the agent and third parties, who need not look to and generally have no chance to look to the express or declared authority, while an express or declared authority forms the basis of dealings between the principal and the agent both of whom are privy to it. It is not necessary that the authority to fall under this head of the apparent authority should be different from the express authority and not identical with it in every case, although, in such case where it is identical it may generally be covered by the more explicit term, the express or declared authority. The apparent authority is the character in which the agent appears before the public. It may or may not be the same as the character actually given to him by the principal. Where it is different, it being the only guiding factor for the public, is even more important than the declared authority itself and always over-rides it so far as the third persons are concerned ⁴

In *Neald v. Beauford*⁵ one Wedge, the Duke of Beauford's agent, had a general authority to conduct the business of an Inclosure, to attend the meetings, and to represent the Duke upon those occasions. The Duke gave him particular instructions, limiting his authority as to one part of the business, which restricted him from exchanging a certain wood except for woodland; but he did not communicate his instructions or those limits to his authority either to the Inclosure Commissioner or to the other party, although he did so to the agent of the other party. The Commissioner allotted lands, which were not woodlands, for the Duke's wood, and the Lord Chancellor said, that if "the agent had acted inconsistently with the instructions which he received in that particular, being a general agent for the purposes of the Inclosure, he considered, so far as his acts went, they were binding upon the Duke." Lord Campbell said the Duke's agent was a general agent for the exchange "the secret limitation imposed by him on the authority of the agent uncommunicated to the other side goes for nothing." Lord Cottenham also said, "Having given this general authority can he (the Duke) be heard to say that this authority was limited by private instruction of which those who dealt with the agent knew nothing." Similarly,

1. See *Mechem*, § 720

2. See *Mechem*, §. 720

3. See *Katlar*, p 150

4. 5 Jur. 1123; 9 Jur., 813, an appeal, 12 Cl & F., 248 (273)

5. *Grant Smith v. Juggobando Shaw*, 2 Hyde, 301

a European firm employed an agent to make purchases of jute for them in the bazaar, upon orders which were in force for two days, and they imposed restrictions on their agent's authority to pledge their credit, which restrictions were not made known to those with whom the agent dealt. The agent paid for jute purchased by his own cheques, but gave receipts for the jute in the name of his principals. One of the vendors sued the European firm for jute applied. Held, that the arrangement between the principal and agent as to credit not being known to the jute dealers generally or to the particular dealer suing, the firm could not cut down or prescribe the apparent general authority by secret limitations and restrictions of which the dealers had no knowledge.¹ So where A employed B to manage his business and to carry it on in the name of B and Company, the drawing and accepting bills of exchange being incidental to the carrying on of such business, but it was stipulated between them that B should not draw or accept bills, B accepted a bill in the name of B and Company, held, that A was liable on the bill in the hands of an indorsee who took it without any knowledge of A and B or the business. Cockburn C. J., said, "The case falls within the established principle that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority" and Mellor J., said, "It would be very dangerous to hold that a person who allows an agent to act as principal in carrying on a business and invests him with apparent authority to enter into contracts incidental to it, could limit that authority by a secret limitation."²

37. Authority inferred from previous conduct of the principal.

Agency by implication or estoppel, as we have already noticed, rests on the principle that when any person, by words or conduct, represents or permits it to be represented, that another person is his agent, he will not be permitted to deny the agency with respect to any third person, dealing on the faith of any such representation, with the person so held out as an agent, even if no agency exists in fact.³ Where A, by words or acts, or by silence or inaction (if there is duty on him to speak or act), represents to B, or to the public, or a class of which B is a member, that X is his (A's agent), or has his authority either generally, or for the purposes of a particular transaction or type of business, and B is induced by such representation to alter his position for the worse, A is estopped from afterwards disputing, as against B, that X was invested with such agency or authority at the time at which he was so described.⁴

Authority by
estoppel

A man is not permitted to resist an inference which a reasonable person would necessarily draw from his words or conduct.⁵ "This agency (by estoppel)" says Pollock C. B.,

1. *Grant Smith v Juggobando Shaw*, 2 Hyde, 301.

2. *Edmund v. Bushell*, L. R., 1 Q. B. 97;

3. See notes on page 77.

4. See *Bower on Estoppel*, §, 232 citing *Reynel v. Lewis*, 15 M. & W. 517.

5. *Anson*, 17th Edn., pp. 405, 406.

"may be created by the representation of the defendant to the plaintiff that the party making the contract is the agent of the defendant, or that such relation exists as to constitute him such; and if the plaintiff makes the contract on the faith of the defendant's representation; the defendant is bound; he is estopped from disputing the truth of it with respect to that contract, and the representation of an authority is, *quod hoc*, precisely the same as a real authority given by the defendant to the supposed agent. This representation may be made directly to the plaintiff, or may be made publicly so that it may be inferred to have reached him, and be made by words or by conduct."¹ It is, however, to be observed that strictly speaking, no agency is created by such representation but is only presumed; nor the representation of authority precisely the same as a real authority. As between the parties to the estopped, it has precisely the same effect as if there had been a real authority.²

"It is a well-established principle that if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation direct him of that authority" "Good faith requires that the principal shall be held bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts and to bind him thereby"⁴ Lord Ellenborough C. J. observed in *Pickering v. Busk*.⁶ "If a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. It is clear that he (the agent) may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject matter; and there would be no safety in mercantile transactions if he could not. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one sends goods to an auction-room, can it be supposed that he sent them thither merely for safe custody"? In the same case he observed: "Strangers can only look to the act of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a parson authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority."

With reference to the sale or other disposition of goods, it has been held in a long series of authorities that, where the representor "holds out" to the representee, or to the class

1. Per Pollock C. B. in *Ryenll v. Lewis*, 15 M. & W. 517.

2. See Bower on Estoppel, p. 198.

3. Cockburn C. J., in *Edmunds v. Bushell* (1865) L. R. 1 Q. B. 97, 99.. See *Chottey Lal Pannalal v. R. K. Railway*, A. I. R. 1932 All 540=54 All. 557=138 I. C. 439.

4. Story on Agency. S. 127.

5. (1812) 15 East 38=13 B. R. 364, 366. C. C. S. 27 of the Sale of Goods Act. 1230.

of persons dealing with him, of whom the representee is one, a certain person as having his authority to sell, pledge, or otherwise deal with goods on his behalf, which representation may be made either expressly in language, or impliedly by conduct (e. g. by investing a person whose business is that of a broker or mercantile agent with such apparent authority as may reasonably be inferred from his possession, in these characters, of the goods or documents of title thereto) the representor, in accordance with common law rules, and also certain statutory provisions partly declaring and partly extending those rules, is estopped from denying the existence of such apparent authority, or from disowning the agency so held out.¹ In respect of dealings with negotiable instruments, it has been held that one who hands over to another a stamped paper executed in black, thereby represents to any person into whose hands the paper may come after having been turned into a negotiable instrument, that the person to whom the paper was entrusted had his authority to fill it up in any manner, and with any figure covered by the stamp, and is accordingly estopped from denying such ostensible authority as against the representee.² Similarly, one who has handed to another an instrument on the face of it negotiable, is precluded against a holder in due course, from disputing the authority of such person to negotiate it.³

For illustrations see notes on pages 80 to 85.

It is to be observed that as the whole doctrine of powers by estoppel rests upon the theory that the other party has been led to rely upon appearances to his threatened detriment, it is obvious that the doctrine can apply only to those cases in which this element of reliance was present. It can, therefore, apply only to cases where credit has been extended, action has been induced, delay has been obtained, or some other change of position has occurred, in reliance upon the appearance of authority.⁴ The reliance on what the principal has said or done himself or through an authorized agent is indispensable to create estoppel against the principal. The mere acts of the agent in question are not sufficient for this purpose unless there is also evidence of the principal's knowledge and acquiescence in them.⁵ Moreover in any case the reliance must have been a reasonable one, consistent with the exercise of reasonable prudence, and the party who claims reliance must not have closed his eyes to warning or inconsistent circumstances. Authority is not apparent merely because the party claiming has acted upon his conclusions. It is not apparent in contemplation of law, simply because it looked so to him. It is not a situation where one may read while he runs. It

1. See *Pickering v. Busk*, 15 East 38; *Dyer v. Pearson*, 3 B. & C. 38; *Waller v. Drakeford*, 1 E. & B. 749; *Baines v. Swainson*, 32 L. J. Q. B. 281; *Werner v. Harris* 1 K. B. 285; *Turner Henderson v. Williams*, 64 L. J. Q. B. 308; *Turner v. Simpson*, 27 T. L. R. 200.
2. *Young v. Grote*, 4 Bing. 253; *Nash v. De Freville*, 2 Q. B. 72.
3. *Bower on Estoppel*, §§. 326—328.
4. *Mechem*, §. 724.
5. See *Farmer's Co-operative Shipping Association v. Adams*, 84 Neb. 752; *Katjar*, p. 154.

is only where a person of ordinary prudence, conversant with business usages, and the nature of the particular business, acting in good faith, and giving heed not only to opposing inferences but also to all restrictions which are brought to his notice, would reasonably rely, that a case is presented within the operation of the rule. If the inferences against the existence of the authority are just as reasonable as those in favour of it there can be no reliance within this rule.¹

Section 237 of the Indian Contract Act, 1872, provides that when an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority. The subject will be dealt with under the heading "liability of principal".

38. Authority conferred by subsequent adoption of the unauthorized acts of the agent by the principal.

Authority
conferred by
ratification.

A reference has also been made to creation of agency by subsequent ratification.² Ratification is the adoption as his own by a principal of an unauthorized act or contract of an agent or of an entire stranger. The law generally gives the principal an option to adopt the unauthorized acts of the agent. After they are adopted they become as much binding on the principal as if they had been done with his previous authority. In fact, it supplies lack of prior authorisation. The principles of 'ratification' will form the subject of a separate chapter.

Mechem, §. 726, and authorities cited therein; See Katlar, p. 154.
See notes on page 101.

CHAPTER VI

CONSTRUCTION OF AUTHORITY

39. Construction of authorities generally. 40. Construction of powers of attorney.
41. Construction of verbal authority. Construction of contracts conferring certain special kinds of authorities.

39. Construction of authorities generally.

The relation of agency being a contractual relation, like all other contracts in a contract of agency also the intention is to be gathered from the contract itself. The duty of the courts is not to make contracts between parties but to construe and enforce contracts which they have already made for themselves.

Intention of the parties primary consideration.

Authority may be conferred in writing or may be verbal. Where it is given by a formal instrument, such as a power of attorney, it has been laid down that the authority given must be construed strictly; the special purpose for which the power is given is first to be regarded,¹ and the most general words² following the declaration of that special purpose, will be construed to be merely all such powers as are needed for its affluatuation;³ yet the authority will, even without the assistance of general words, be held to include all the means necessary to attain the accomplishment of the principal power.⁴ And in construing words in a power of attorney the rule applicable to other documents, that the words must be looked at in connection with the context as well as with the general object of the power, must not be lost sight of.⁵

Authority conferred in writing must be construed strictly.

The intention of the parties is primarily to be gathered from the language used by them in the document by which the authority was conferred. Where the plain and unambiguous language used in the document itself does not support the conferment of a certain authority, the court cannot read it into the instrument although the intention to convey such power may be otherwise clear.⁶

Construct of general words

Authority conferred in general terms is construed as authority to act only in the usual way, and according to the ordinary course of business.⁷

The whole document should be looked into for this purpose whether it consists of one piece of paper or is written on several pieces, provided that the several papers are so physically attached or so connected by reference, or are so obviously relating to the same subject, that they must all be read together.⁸

1. *Lewis v. Ramsdale*, W. N. (1886), 118.
2. *Sheoratan Kuar v. Mahipal Kuar*, per Mahmood J., 1 L. R. 7 All. 258, (270).
3. *Judah v. Addi Raja Queen Bibi*, 2 Mad. H. C. 177. *Attwood v. Muntings*, 7 B & C. 278, (284). *Perry v. Holl*, 6 Jur. N. S. 661.
4. *Howard v. Ballie*, 2 H. Bl. 618 (619).
5. *Jonmenjoy Coondo v. Watson*, 1 L. R. 10 Cal. 901, 911.
6. *Minnesota Stoneware Co. v. Mc Cressen*, 110 Wis. 816.
7. See Bowstead, Article 84, p. 56.
8. *Mexican National Coal Co., v. Frank*, 154 Fed. 217.

Thus, where a power of attorney was accompanied by a letter it was held that the intention of the parties was to be gathered from the language used in both.¹

But a third party dealing with the agent in good faith, and in the exercise of reasonable prudence, in reliance upon an apparently complete document could not be bound by limitations contained in other writings of which he had no notice. So where a principal wired to his agent, "Employ Farrington and post letter will follow" and the agent acting on it showed the telegram to Farrington and engaged him, the latter, however, did not inquire for the letter or see it, it was held that the telegram was sufficient authority for such employment notwithstanding limitations as in compensations contained in the letter, and that it was not the duty of Farrington to inquire as to the terms contained in the letter as reasonable businessman.² But where the limitations on the agent's authority were printed on the back of the contract made with the agent and conferring authority on him, it was held that the person dealing with the agent was bound by such limitations.³

It has been held that the power must be construed strictly and that the special purpose for which the power is given is first to be regarded, and general words following that special purpose are to be construed as being all such powers as are needed for its effectuation. In Keshav Bapuji v. Narayan Shamrar⁴ a power appointing a Muktar a true and lawful attorney "to make accurate inquiries as regards the lands of a certain village mortgaged by the donor, and to redeem the same, to sue or make petition, to make an appeal, or special appeal, and to answer and sign for the donor, and to pass all manner of documents, and to register etc., the same and to do other work in connection with the same wherever the same may be required to be done, which the donor, if present, would have been called on or permitted to do" was held not to authorize the Muktar to enter into an engagement with a pleader to pay him Rs. 99 as reward on the day of decision of the case instituted to redeem their lands even though the suit be amicably settled, Sargent J. saying that a mere power to sue would not authorize an agent to do more than employ a vakil on the terms of paying him a reasonable remuneration, and that as to the power "to pass all manner of documents and to have them passed in connection with the lands and to register the same," such a power was by its very terms confined to documents relating to the lands which the client was anxious to recover and not to the suit to be brought to recover them.

So, a power authorizing the execution of bonds in lieu of former debts does not authorize the execution of a bond to secure a debt already barred by limitation.⁵

1. *Clannahan v. Greeding*, 172 Ind. 457.
2. *Farrington v. Hayes*, 65 Vt. 153; see also *Haubelt v. Rea & Page Mill Co.*, 77 Mo. App. 672.
3. *Butler v. Standard Guarantee Co.*, 125 Ga. 371.
4. *I. L. R.* 10 Bom. 18.
5. *Hubtal Sukul v. Ramgotsi Dey Roy.*, 11 C. L. R. 581.

Again, where a jamadar gave to his brother a power of attorney "to conduct cases on his behalf, to appoint any pleader or muktear, to receive money deposited and due to him from the Courts, to act in dakhil-kharij cases, to purchase villages under decrees, to file receipts and razeenamahs, acquittances and other documents," and the donee of the power referred a pending suit to arbitration, Mr. Justice Turner and Mr. Justice Broadhurst said, "The language of a written document of this nature when distinct must have its proper effect".....
 "in our judgment it is going too far to hold that these terms authorized the attorney to refer question to arbitration"¹ In *Budh Singh Dudhuria v. Derendranath Sencul*² under a power of attorney executed by twenty proprietors of a joint estate, empowering their general manager "to raise loans for the purpose of the estate upon bonds, and to sign their names or his name on their behalf, and to pledge the whole or any part of the estate by such bonds" the attorney executed a bond on behalf of three of the proprietors; Garth C. J., and Bose J., held that the manager was not authorised to execute a bond on behalf of any one or more of the proprietors making him or them responsible for the whole money borrowed to the exclusion of the rest; and that in a suit upon a bond so executed the plaintiffs were not entitled to rely upon the general power which the manager might have, as the manager's authority must be considered as strictly confined to the terms of the power of attorney. In *Tyebumissa v. Kaniz Fatima*,³ a power was given to a mooktar "to make arrangements for khas collections, or grant ticca and ijarah leases, and when advisable, sell, mortgage and make gift of the whole or portion of the right of the proprietors." Under this power the mooktear granted a permanent tenure. Held, that so far as creating undertenures, the authority given to the mooktear under the power was limited to the granting of ticca and ijarah leases; that there was abundant authority for the proposition that a power to sell would not authorize a mortgage; and the same reason would warrant the Court in holding that the power to sell or mortgage would not render a permanent tenure created by the mooktar valid; that as to the power of "making gift," it was but reasonable to hold that it authorized the agent formally to execute a deed of gift only when the disposing power had been exercised by the principals; and that the agent had no power under the power to exercise the power of disposition by gift by his will and determination quite irrespective of the concurrence of the ladies, and that a power of this kind must be strictly construed against the grantee.⁴

In *Harper v. Godsell*,⁵ a partner in the firm of B. W. and Company, gave to another person a power of attorney "for the purpose of exercising, for me, all or any of the powers and privileges conferred by an indenture of partnership constituting

1. *Thakoor Pershad v. Kalu Pershad*, 6 N. W. P. H. C., (1874), 210.

2. 11 C. L. R. 323.

3. 18 C. L. R. 247.

4. See also *Sudisht Lal v. Seoharat Koor*, L. R. 8 I. A., 39 and *Ram Narain Potdar v. Ramnath Schaka*, 2 W. R. 231 referred to in this case.

5. L. R. 5 C. P. 422.

the firm of B. W. and Company, and generally to do, execute, and perform any other act, deed, matter or thing whatsoever . . . in or about my concerns, engagements and business of every nature and kind, whatsoever." Lord Blackburn said that the power did not authorize the execution of a deed dissolving the partnership; that the special terms of the first part of the power prevented the general words from having an unrestricted general effect; and that the meaning of the general words was cut down by the context in accordance with the ordinary rule of *ejusdem generis*, which general principle was laid down in *Arlington v. Merricke*.¹

The mother and guardian of an infant defendant gave to her agent a power of attorney by which she authorized him, "for her and in her name and on her behalf to appear in or sue or defend and to receive all papers and process in any suit, appeal or special appeal, or other judicial proceedings whatsoever in any Court and to act in all such proceedings in any way in which I might, if present, be permitted or called on to act". The agent entered into an agreement with a vakil to pay him Rs. 4,000 if the appeal was decreed in full in favour of the infant; and in a case a less sum should be decreed than that fixed by the decree of the lower court, then that he should be paid one-fourth of the difference; and lastly that if any money should be ordered to be paid to the appellant by the respondent, then that such sum should be paid to the vakil in addition to Rs. 4,000. The decree of the lower Court was reversed and the infant's estate was benefitted to the amount of Rs. 21,487. In a suit by the vakil to recover under this agreement, Sargent, J., said: "It can scarcely be doubted, looking at the whole of this instrument that the particular object of it is to enable the attorney to represent the party to the suit in all judicial proceedings to the same extent as the party himself if present might be permitted or called upon to do. Authority is given, it is true, to sue and defend, but these words must, as Mr. Justice Story says in his work on Agency, be construed in subordination to the particular subject matter in connection with which they are used; here from the position which they occupy, they plainly denote the two-fold character of plaintiff or defendant in which the attorney may be called upon to appear and act in any suit, appeal, or special appeal, or other judicial proceeding whatsoever in any Court; and whatever acts might otherwise be properly included in the expression, "sue and defend," if they stood alone, they are here clearly confined to acts done in the above proceedings. Assuming, however, that the words "sue and defend" should, as was contended for the plaintiff, be read apart from the context which limits them, as we think, to acts done in judicial proceedings, we should equally find it impossible to construe them as authorizing the execution of the bond in question. It was then said that a power to sue would authorize the appointment of a vakil, and that as special arrangements with vakils for the remuneration of their services are allowed by law and are of

² Wm. Sanders, 411, (p) 818; but see the remarks of Fry L. J. as to this in *Hutchinson v. Eaton* L. R. 13 Q. B. D. 861

every day occurrence, the bond was, therefore, within the power as one of the usual and appropriate means for accomplishing the object of the agency. But the general rule, which allows of the agent resorting to all usual means for carrying out his agency, has always received a restricted application in construing formal and deliberate instruments of this sort as distinguished from ordinary documents conveying instructions and letters of advice which are of such constant use in commercial matters"

In this case, however, the decision was more particularly grounded on the fact that the authority was given by a person in a representative character and for and on behalf of the estate of a minor.¹

In *Lewis v. Ramsdale*,² the defendant executed in favour of one Locke a power of attorney for the purposes hereinafter expressed, that is to say, "to sell, let, and manage real estate, and to sell, and convert into money personal estate and effects, and to enter into, sign and execute any contract or deed that might, in the opinion of the attorney, be necessary or proper for effectuating the purposes aforesaid, or any of them, and for all or any of the purposes of these presents to use the name of me the said _____ and generally to do, execute, and perform any other act, deed, matter or thing whatsoever which ought to be done, executed or performed, or which, in the opinion of my said attorney, ought to be done, executed or performed in or about my concerns, engagements, and business of every nature and kind whatsoever, as fully and effectually to all intents and purposes as I myself could if I were present and did the same in my proper person." Upon the execution of this power the defendant left with Locke a promissory note, some share certificates, and paintings. Locke purporting to act under the power of attorney executed a mortgage of the promissory note, shares and paintings to the plaintiff; held, by Stirling J., that the mortgage was not within the power of attorney, and that the "purposes" for which the power was given were clearly stated that the general clause was prefaced with the words "and for all or any of the purposes of these presents" which governed the whole clause and referred to the special purposes defined.

The words must be looked at in connection with the context as well as with the general object of the power. In *Watson v. Jonmejy Coondoo*,³ the plaintiff Watson gave to the members of the firm of Messrs. Nicholl & Co., a power of attorney authorising them jointly and severally to "negotiate, make sale, dispose of, assign and transfer, all or any of the Government promissory notes or other Government paper, bank shares or shares in any public company, and other stocks, funds and securities of any description whatsoever now or hereafter standing in my name _____ and for the purposes aforesaid or any of them to sign for me and in my name and on my behalf, any and every contract or agreement, acceptance or other document." One of the members of the firm of Messrs. Nicholl & Co., (Thompson) without the knowledge or authority

The words must be looked in connection with the context well as the general object of the power

1. *Rav Sahab v. Kamalja Rai*, 10 Bom H C, 26.

2. W. N. (1886), 118.

3. I. L. R. 8 Cal. 934.

of the plaintiff pledged these securities to the firm of Ameer Singh Shamah Mull as security for an advance of Rs. 19,000, and executed as attorney for Watson a promissory note for the amount of the loan, and the said firm on the same day transferred the note and security to the defendant. The plaintiff brought a suit to recover his securities or the value thereof. The Calcutta High Court held that the defendant's contention that if the word "negotiate" did not of itself authorize the transaction, it did so when coupled with the words lower down in the power of attorney, viz., "and for the purposes aforesaid to sign for me and in my name and on my behalf any and every contract, agreement, acceptance or other document," could not hold ground as the general words could not be construed as enlarging the authority of the donee of the power, but were confined strictly in the doing of things necessary to be done in performing the acts authorized by the power, and that the defendant having failed to show that the pledge of the Government note was authorized by the power of attorney, it followed that he acquired no title to the note by its delivery to him. On appeal to the Privy Council, the Judicial Committee said:— "It seems to have been thought by two of the learned Judges of the High Court that it was laid down in this case (*Bank of Bengal v. Fagan*),¹ as a rule of construction, that words used in a power of attorney to express the objects of the power are always to be construed disjunctively. Their Lordships cannot agree in this view of the case. The words there may have been used disjunctively but they do not see any reason why the rule laid down by Lord Bacon *copulatio verborum indicat acceptationem in eodem sensu*, which is intended to aid in arriving at the meaning of the parties, should not be used in construing a power of attorney as much as any other instrument..... The power of attorney in the present case is not in the same form as that in the *Bank of Bengal v. Macleod*;² it does not contain in express words a power to "endorse," if it had, the question would have been whether there was anything to prevent it from being a power in the discretion of the donee of it to endorse the note, and so convert it into one payable to bearer, whenever he thought fit to do so for that purpose. But in this power the endorsement is not authorised in express words, but is authorized if it comes within the meaning of the words "And for the purposes aforesaid, to sign for me and in my name and on my behalf, any, and every contract or agreement, acceptance or other document" The appellant's Counsel relied mainly upon the word "negotiate" and also upon "dispose of." In order to see what was intended by these words, they must be looked at in connection with the context, as well as with the general object of the power. This appears to their Lordships to have been to sell or purchase for Watson, Government promissory notes and other securities, not to borrow or lend money on them. If the word "negotiate" had stood alone, its meaning might have been doubtful, though, when applied to a bill of exchange or ordinary promissory note.

1. 5 Moo. I. A., 27.
Moo I. A. I.

it would probably be generally understood to mean, to sell or discount, and not to pledge it. Here it does not stand alone, and looking at the words with which it is coupled, their Lordships are of opinion that it cannot have the effect which the appellant gives to it, and for the same reason, "dispose of" cannot have that effect."

The language should be construed in the light of the surrounding circumstances with reference to which it was used. Where, therefore, an authority is drawn up with reference to some statute it should be interpreted in the light of such statute. If an authority is given to do some act provided for by a statute, the language and object of the statute are to be taken into account in determining the intent and the extent of the power.¹ For this very reason the purpose for which the authority was created or conferred is also taken into account. General words do not confer general powers, but are limited to the purpose for which the authority is given and are construed as enlarging the special powers when necessary and only when necessary for that purpose.² Thus, where power was given "to demand and receive all money to the principal on any account whatsoever, and to use all means for the recovery thereof, to appoint attorneys to bring actions, and to revoke such appointments and to do all other business"; held, that "all other business" must be construed to mean all other business necessary for the recovery of the moneys, or in connection therewith; and that the power of attorney gave the agent no authority to indorse a bill of exchange received by him thereunder.³

Language used is to be construed in the light of the surrounding circumstances.

As a general rule, when a transaction has been reduced into writing, either by requirement of law, or agreement of the parties the writing becomes the exclusive memorial thereof; and no extrinsic evidence is admissible either to independently prove the transaction, or to contradict, vary, add to, or subtract from, the terms of the document, though the contents of such document, may be proved either by primary or secondary evidence.⁴ The grounds of exclusion are:— (1) that to admit inferior evidence when the law requires superior would be to repeal the law; and (2) that when the parties have deliberately put their intentions into writing, it must be assumed as between themselves that they intended the writing to form a full and binding statement of such intentions, and one which should be placed beyond the reach of future controversy, bad faith, or treacherous memory.⁵ All parol testimony of conversations held between the parties, or declaration made by either of them, whether before, or after, or at the time of the

Parol evidence to show surroundings of the parties when admissible.

1. See *Mechem*, § 769, and the authorities cited therein.

2. See *Bowstead*, p. 59, citing *Lewis v. Ramsdale*, (1836), 55 L. T. 179; *Athwood v. Munnings* (1827), 7 B. & C. 278; *Re Bowles* (1874), 31 L. T. 365; *Harper v. Godsell* (1870), L. R. 5 Q. B. 422; *Bryant v. La Banque du Peuple*, (1893) A. C. 170.

3. *Hogg v. Snaith*, (1808) 1 Taunt. 347; *Hay v. Goldsmidt* (1804) 1 Taunt. 349; *Estelle v. La Nauze* (1835), 4 L. J. Ex. Eq. 46; *Murray v. East India Co.*, (1821), 5 B. & A., 204.

4. Section 92, Indian Evidence Act, 1872.

5. *Phipps* 394

completion of the contract, will be rejected ; because such evidence would tend to substitute a new and different contract for the one really agreed upon.

In order, however, to protect people from fraud, misrepresentation or mistake or from falling a prey to sharp practices or to correct or supplement incorrect or incomplete expressions in a deed due to defective draftsmanship or informality of a document, the law allows extrinsic evidence, oral or documentary, to prove —

- (a) that notwithstanding a written agreement, there was no real agreement between the parties ;¹
- (b) that a writing does not represent a completed transaction ;²
- (c) that an informally drawn document does not contain the real agreement ;³
- (d) that there exists any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms,⁴ or which constitutes a condition precedent to the attaching of any obligation under the deed ;⁵
- (e) that there exists any fact which would invalidate the document or which would entitle any person to a decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity to contract, want or failure of consideration, or mistake of fact or law ;⁶
- (f) that there exists any usage or custom by which incidents not expressly mentioned in the deed are usually annexed to contracts of the description of the one contained in the deed ; provided that the annexing of such incidents would not be repugnant to or inconsistent with the express terms of the deed ;⁷
- (g) that there are facts which show in what manner the language of the document is related to existing facts.⁸

Thus in doubtful cases evidence of the situation, surroundings and relations of the parties may be adduced ; for though the writing cannot, in general, be contradicted by oral evidence yet the circumstances may properly be used as aids, and for putting the court more or less fully into the exact position or situation of the parties, to enable it to see the subject-matter as they saw it.⁹

When, however, language used in a document is plain in itself, and when it applies accurately to existing facts, evidence

1. See Munn's Principles and Digest of the Law of Evidence, 2nd Edn p. 626.

2. *Ibid*, p. 628.

3. *Guddalu v. Kunnatter*, 7 Mad. H. C. R. 189, *Pym v. Campbell*, E. & B. 370 ; *Harris v. Rickett*, 28 L. J. Ex. 197.

4. Proviso 2, S. 92, Indian Evidence Act, 1872.

5. Proviso 3, S. 92, Indian Evidence Act, 1872.

6. Proviso 1, S. 92, Indian Evidence Act, 1872.

7. Proviso 5, S. 92, Indian Evidence Act, 1872.

8. Proviso 6, S. 92, Indian Evidence Act, 1872.

9. *Mecham*, S. 770.

may not be given to show that it was not meant to apply to such facts.¹ So also when the language used is ambiguous or defective on its face, evidence may not be given of facts which would show its meaning or supply its defects.²

When the language used is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.³ When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.⁴ So also when the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.⁵

Where the authority of an agent is conferred in such ambiguous terms, or the instructions given to him are so uncertain, as to be fairly capable of more than one construction every act done by him in good faith, which is warranted by any of those constructions, is deemed to have been duly authorized, though the construction adopted and acted upon by him was not the one intended by the principal.⁶ An agent was instructed to sell goods at such a price as would realise 15 s. per ton, net cash. He sold them at 15 s. 6 d. per ton, subject to two months' credit. Held, that the instructions might fairly be construed as meaning either 15 s. net cash, or such a price as would eventually realise 15 s. after allowing for interest, or a *del credere* commission; and that the sale at 15 s. 6 d., subject to two months' credit was within the authority.⁷

Construction of authority given in ambiguous terms.

A commission agent was authorized to buy and ship 500 tons of sugar (subject to a certain limit in price, to cover cost, freight, and insurance), 50 tons more or less of no moment, if it enabled him to secure suitable vessel. Held, that a shipment of 400 tons was a good execution of the authority.⁸

An agent undertook to sell and transfer certain stock when the funds should be at 85 or over. Held, that he was bound to sell when the funds reached 85, and had no discretion to wait until they went higher than that price.⁹

Further, an authority is generally construed in case of doubt according to the usual course of dealing in the business to which it relates,¹⁰ partly because this may be presumed to have

1. S. 94, Indian Evidence Act, 1872.

2. S. 93, Indian Evidence Act, 1872.

3. S. 95, Indian Evidence Act, 1872.

4. S. 96, Indian Evidence Act, 1872.

5. S. 97, Indian Evidence Act, 1872.

6. Bowstead, Article 35, p. 58, and the authorities cited therein.

7. *Boden v. French*, (1851), 10 C. B. 886.

8. *Ireland v. Livingston* (1872), L. R. 5 H. L. 395=41 L. J. Q. B. 201.

9. *Bertram v. Godfray*, (1930), 1 Knapp 381, P. C.

10. *r. q. Pole v. Leank* (1860) 28 Beav. 562. But an agent entrusted with goods for sale by a person who does not trade in such goods has no implied authority to bind his principal by a warranty: *Brady v. Todd* (1861) C. B. N. S. 592=127 R. R. 797.

been really intended, and partly because third persons may reasonably attribute to an agent such authority as agents in the like business usually have. This last reason has been extended to holding an undisclosed principal liable for a purchase on credit which he had expressly forbidden the agent to make.¹ As in the case of an undisclosed principal there can be no apparent authority, and in fact there was no real authority, the correctness of this decision is doubtful.² It rather seems that the rule applies only where credit is given not to the agent alone, but to the principal or firm which he apparently represents.³

Construction of authority not given under seal.

It has been held under the English law that where the authority of an agent is given by an instrument not under seal, or is given verbally, it is construed verbally, having due regard to the object of the authority, and to the usages of trade or business.⁴

It has been held that a written authority is capable of execution either verbally or by conduct. Such an authority is not so strictly construed as one under seal, and regard is had to all the circumstances of the agency business.⁵ The ordinary full authority given in one part of the instrument will not be cut down because there are ambiguous and uncertain expressions elsewhere;⁶ but the document will be considered as a whole for the interpretation of particular words or directions.⁷ When once an authority has been reduced into writing, the interpretation of the written document is, in general, a matter of law for the court and not a question of fact for the jury.⁸

40. Construction of powers of attorney.

A power of attorney is a formal instrument (generally executed under seal in England, but not in India outside the Presidency towns) by which authority is conferred on an agent.⁹ Such an instrument is construed strictly, and confers only such

1. *Watteau v. Fenwick* (1891) 1 Q. B. 346.

2. See Pollock & Mulla, Indian Contract Act, 7th Edn., p. 537. It is not approved by Lord Lindley, Partnership, 10th Edn., 174, note, and see L. Q. R. ix, iii: *Ramchandra Saru v. Kasem Khan* (1923), 28 C. W. N. 824, 829—81 L. C. 518—A. L. R. 1925 Cal. 29. Mr. Floyd R. Mechem in Harv. Law R. xxiii, 601, admits that *Watteau v. Fenwick* "can clearly not be sustained upon the ordinary principles of estoppel," but supports it on the ground of holding out, or "putting forward" an "ostensible principal." But surely an "ostensible principal" is not "put forward" by any one. If there is no estoppel there can be no holding out. The case was followed on similar facts in *Kinahan & Co., v. Parry* (1910) 2 K. B. 389 (reversed on the facts without any decision in point of law, (1911) 1 K. B. 459), but only as binding on a court of co-ordinate jurisdiction, and it is still doubtful whether it will ultimately be supported as of general application; the trade there in question has many peculiarities in England.

3. This condition was satisfied in *Edmunds v. Bushell* (1865) L. R. 1 Q. B. 97, which *Watteau v. Fenwick* preferred to follow. See Pollock & Mulla, p. 537.

4. Bowstead, Article 37, p. 62 citing *Pole v. Leask*, (1860), 28 Beav. 562; *Entwistle v. Dent*, (1848), 1 Ex. 812; *Pariente v. Lubbock* (1855), 20 Beav. 588; *Gillow v. Aberdare* (1893), 9 T. L. R. 12 C. A.; *Ex p. Howell* (1865), 12 L. T. 785; *Ex. P. Frampton* (1859), 1 De. G. F. & J. 263; *Tallentire v. Ayre*, (1884), 1 T. L. R. 143, C. A.

5. *Pole v. Leask* (1860), 28 Beav. 562; affirmed (1863) 33 L. J. (Ch.) 155.

6. *Pariente v. Lubbock* (1856), 8 De G. M. & G. 5.

7. "May" will, if the context so warrant, be interpreted as "must". *Entwistle v. Dent* (1884), 1 Exch. 812.

8. See Halsbury, Vol. I (2nd Edn.), Sec. 373, pp. 215, 216.

9. See *Stocking v. Tata Iron & Steel Co.*, 1917 Pat. 273—41 I. C. 175.

authority as is given expressly or by necessary implication.¹ It can be held to include only those powers which are given by the express terms of the instrument of authority, and those which are necessary, essential and proper to carry out those expressly given.² The rule has been thus stated by a learned American Judge:—"A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. They are not subject to that liberal interpretation which is given to less formal instruments, as letters of instruction etc., in commercial transactions which are interpreted most strongly against the writer, specially when they are susceptible of two interpretations, and the agent has acted in good faith upon one of such interpretations."³

One of the most important rules for the construction of a power of attorney is that regard must be had to the recitals which, as showing the scope and object of the power, will control all general terms in the operative part of the instrument.⁴ Thus, where a power of attorney recited that the principal was going abroad, and the operative part gave authority in general terms, it was held that the authority subsisted only during the principal's absence abroad.⁵ A power of attorney to manage the principal's affairs while he is abroad, amplified by a letter from the principal to his bankers stating that he wished the power to cover the drawing of cheques upon the bank without restriction, does not authorize the attorney to draw cheques in payment of his own private debts.⁶

Operative part of the deed is controlled by the recitals.

Another rule is that where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts, and that general words do not confer general powers but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers when necessary, and only when necessary, for that purpose.⁷ In *Jacobs v. Morris*,⁸ A., who carried on business in Australia, gave an agent in England a power of attorney to purchase goods in connection with the business, either for cash or on

Special power followed by general words.

1. *Bryant v. La Banque du Peuple* (1893) A. C. 170; *Jonmenjoy Cuondo v. Watson*, (1884), 9 App. cas 561. *Jenkins v. Gault* (1827), 3 Russ. 385. Cp. *Bank of Bengal v. Macleod*, (1849), 5 M. L. A. 1—83 R. R. 1; *Bank of Bengal v. Fagan* (1849), 5 M. L. R. 27=83 R. R. 15 (a power "to sell, indorse and assign", does authorise an indorsement to a bank as security for a loan); *Krishna v. Raja of vijayanagram*, 38 mad 832. *Muluk Chand v. Shah Moohan*, 14 Bom 590; *Bhugwant v. Ganga*, 37 I. C. *Bank of Rangoon v. Shamsundaram*, 26 I. C. 253; *Nazarali v. Araf Ali*, 47 I. C. 528 (*thusram v. Raja Mohan* 6 Cal L. J. 639. See also Bowstead Art. 36 p. 59, Mechem § 784.
2. *Ibid.*
3. *Craighead v. Peterson*, 28 Am. Rep 150, quoted with approval in *Forges v. United States Mortgage Co.*, 203 N. Y. 181
4. See Bowstead, Article, 36, p. 59.
5. *Danby v. Coutts* (1885), 29 Ch. D. 500.
6. *Reckitt v. Barnett*, (1929), A. C. 176=98 L. J. K. B. 136; *Midland Bank v. Reckitt*, (1933) A. C. 1=102 L. J. K. B. 297
7. Bowstead, Article 36, p. 59.
8. (1902) 1 Ch 816=71 L. J. Ch 363, C. A.; See also *Hogg v. Snaith* (1808), 1 Taunt 347 *Perry v. Hall*, (1860), 29 L. J. ch 677=2 De G. F. & J. 38.

credit, and where necessary in connection with any such purchases, or in connection with the business, to make, draw, sign, accept or indorse for him and on his behalf any bills of exchange or promissory notes which should be requisite or proper. It was held that the power of attorney gave no power to borrow money, and the agent, purporting to act in pursuance of the power, having given bills of exchange in respect of a loan, and misapplied the money, that A was not liable on the bills. Where an executor gave a power of attorney to transact in his name all the affairs of the testator, it was held that the agent had no authority to accept a bill of exchange in the name of the executor so as to bind him personally.¹

A power of attorney "to recover and receive all sums of money owing by virtue of any security and to give, sign, and execute receipts, releases, or other discharges for the same, and to sell any real or personal property . . . belonging" to the principal, does not authorize the agent to exercise the statutory power of sale of real property vested in the principal as a mortgagee.² A power of attorney giving "sole and absolute control of all my property whether owned by me solely or jointly with any other person or persons" applies only to property in beneficial ownership and not to property held on trust for sale.³

A resident director and manager of a mining company was authorized by deed "to direct the mine so as most effectually to promote the interests of the company, to employ workmen, provide needful implements, etc., but not to engage the credit of the company for more than £50 without the express authority in writing of the managing director." Held, that he had no authority to bind the company by accepting bills of exchange.⁴

A power of attorney "from time to time to negotiate, make, sale, dispose of, assign and transfer," gives no authority to pledge.⁵ But a power "to sell, indorse and assign" does authorize an indorsement to a bank as security for a loan to the agent; such a power is construed as giving (1) authority to sell, (2) authority to assign.⁶

A power of attorney is, however, construed as including all medium powers necessary for carrying out its object effectively.⁷ A power to commence and carry on all actions, suits, and other proceedings, touching anything in which the principal

Includes all incidental powers necessary for its effective execution.

1. *Gardner v. Baillie* (1796), 6 T. R. 591 (*Howard v. Baillie*, 2 H. Bl. 618=3 R. R. 531 was decided on the ground of ratification).
2. *Re Dawson and Jenkins' Contract*, (1904), 2 Ch. 219=73 L. J. Ch. 684, C. A.
3. *Green v. Whitehead*, (1930) 1 Ch. 88.
4. *Brown v. Byers* (1847), 16 L. J. Ex. 112=16 M. & W. 252. And see *Smith v. Prusser*, (1907) 2 K. B. 735=77 L. J. K. B. 71, C. A.
5. *Jonmenjoy Coondoo v. Watson* (1884), 9 App. Cas. 561 (cited at p. 175); *De Bouchout v. Goldsmid* (1800), 5 Ves. 211.
6. *Bank of Bengal v. Macleod* (1849), 5 Moo. Ind. App. 1; *Bank of Bengal v. Fagan*, 5 Moo. Ind. App. 27 P. C.
7. See *Bowstead*, Art. 36, p. 59; *Withington v. Herring*, (1829), 5 Bing. 442; *Howard v. Baillie*, (1796), 2 H. Bl. 618; *Willis v. Palmer* (1860), 29 L.J.C.P. 194, *Routh v. Mac Millan* (1863), 33 L. J. Ex. 38; *Ex parte Frampton*, (1859) 1 D. F. & J. 268=125 R. R. 443.

might be in anywise concerned was held to authorize the signature by the agent on behalf of the principal of a bankruptcy petition against a debtor of the principal.¹ A partner gave his son a power of attorney "to act on his behalf in dissolving the partnership with authority to appoint any other person as he might see fit." *Held*, that this gave the son power to submit the partnership accounts to arbitration.²

A clause in a power of attorney, whereby the principal agrees to ratify and confirm whatsoever the attorney shall do or purport to do by virtue of the power, does not extend the authority given by the power.³

Where a power of attorney authorized the agent to institute suit for the recovery of certain land it was held that it did not include a power to take steps to define suits in relation to the same land, the court observing—"This was a formal power of attorney, apparently deliberately executed, attested and recorded. It will therefore be strictly construed in view of the controlling purpose; and the addition of general words will not be construed to extend the authority so as to add new and distinct powers different from those expressly delegated".⁴

Other miscellaneous cases.

Where a power of attorney was given by a widow in general terms to represent her and her interest in the estate of her late husband it was held not to authorize the agent to relinquish dower in lands her husband had conveyed in his lifetime.⁵

So, a general power to act in all matters connected with a certain partnership business, was held not to authorize the formation of a new partnership including the old and new members.⁶

Power "to demand, sue for, recover and receive, by all lawful ways and means, all moneys, debts, and dues whatsoever, and to give sufficient discharges, and to transact all business" was held not to include an authority to indorse bills of exchange on behalf of the principal.⁷

The operative part of the deed should be controlled by the recitals. Where authority is given to do particular acts followed by general words, the latter should be restricted to what would be necessary for the performance of the particular acts. General words should not be taken to confer general powers but should be limited to the purpose for which authority is given.⁸

If the authority is exercised by the agent in excess of and outside the reasonable scope of its special powers, the third party will be unable to make the principal liable.⁹ Where an

1. *In re Wallace* (1884) 14 Q. B. D. 22.

2. *Henley v. Super* (1828), 8 B. & C. 16.

3. *Midland Bank v. Reckitt*, (1933) A. C. 1=102 L. J. K. B. 297.

4. *White v. Young*, 122 Ga. 830.

5. *Welch v. Mc Kenzi*, 66 Ark. 251.

6. *Harrison v. Magoon*, 14 Hawaiian, 418.

7. *Murray v. East India Co.*, (1821), 5 B. & A. 204.

8. *Bhagwati v. Ganga*, 36 I. C. 968=10 S. L. R. 78.

9. *Stocking v. Tata Iron & Steel Co.*, 1917 Pat. 273=41 I. C. 175.

act purporting to be done under a power of attorney is challenged as being in excess of the authority of the power, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument either in express terms or by necessary implication.¹

That a power of appointment ought to be exercised *bona fide* for the end for which it is given is one of the first principles which apply to all powers, whether created by contract or will, or law. If the power is exercised *bona fide* and for the end for which it is given, an error of judgment which, from the nature of the case, is a risk originally contemplated by the party bound and agreed to be submitted to, can be no valid defence. If, on the other hand, it is not exercised *bona fide*, or exercised for a collateral or sinister purpose, it is a fraud upon power and a ground of relief.²

Power of
attorney and
vakalatnama.

There is no warrant whatever for putting a power of attorney given to a recognized agent under O. 3, rs. 1 and 2, C. P. C. to conduct proceedings in Court in the same category as a *vakalatnama* given to a legal practitioner, though the latter may be described as a power of attorney. The latter power of attorney is confined only to pleaders, that is, those who have a right to plead in Courts.³ Therefore, an agent with a power of attorney to appear and conduct judicial proceedings, but who has not been so authorized by the High Court, has no right of audience on behalf of the principal.⁴

Written
authority
may be
extended
verbally or
tacitly.

The agent's authority, although in writing, may have been either verbally or tacitly extended by the principal and then, of course, the agent will not be limited to the four corners of the document, but be able to show that he had authority *aliunde*.⁵ For the maxim "*expressum facit cessare tacitum*," as applied to written authorities, only holds good when the whole authority grows out of the writing.⁶ This is only consistent with common sense, for if a man by his conduct leads third parties to believe that he has given his agent larger authority than he has given him by a document in writing or actual words, it would be manifestly unfair for him to be able to avoid responsibility by asking it to be proved that the agent was given authority in writing or verbally, to do the act.⁷

1. *Braynt & Co. v. La Bunque on People*, (1893) A. C. 170, 177, Foll. in *The Bank of Bengal v. Ramanathan*, 43 Cal 527 P. C.; *Narayan v. Chanderban*, 48 I. C. 959; *Bank of Rangoon v. Somasundran*, 26 I. C. 253; *Ghasiram v. Raja Mohan*, 6 Cal L. J. 639.

2. *Secretary of State v. Arthoon*, 5 Mad. 173, 180; *Aleyn v. Belcher*, White and Tudor, Vol. I. p. 377.

3. *Thayayarammal v. Kuppuswami*, 1937 Mad. 937.

4. *Ibid*; *Hurchand v. B. N. Ry.*, 19 O. W. N. 64=28 I. C. 838. *In re Eastern Tuvoy Minerals Corp.*, 61 Cal. 324=1934 Cal 563=151 I.C. 753.

5. *Story*, §. 79.

6. *Ibid*.

7. See Wright's 'Principal and Agent' 2nd Edn. p. 103; see also notes on p. 177.

41. Construction of verbal authority.

When authority is given by word of mouth, its definition and extent are questions of fact, depending on the circumstances of the particular case and the usages of trade or business.¹ An authority conferred in general terms gives an agent power to act in the ordinary way in reference to the particular business, and to do subordinate acts,² and all reasonable acts in relation to the business,³ but does not in the absence of special conditions, give authority to take more than the usual risks or employ extraordinary means.⁴ It is construed in the light of established usages⁵ and carries with it every power necessary and proper to accomplish the object for which it is conferred.⁶ If it is ambiguous the agent is justified if he acts in good faith, and places a reasonable construction on it.⁷ But where it is definite and unambiguous he has no right to exercise a discretion and put his own construction, howsoever reasonable, on it, but must abide by the limits imposed thereby.⁸

Construction
a question
of fact.

Thus an authority granted to an agent to buy does not imply a power to sell.⁹ Nor if a principal merely authorizes his agent to bid at an auction, will he be liable for an agreement entered into by the agent with a third party pledging him to pay to such party a certain sum in consideration that he should abstain from bidding.¹⁰ This case is, however, a suppositious case only, put by their Lordships of the Privy Council, after having found that the facts finding such a case, were not warranted by the evidence and had not been stated in the pleadings.¹¹ So where an agent of a wharfinger whose duty it was to give receipts for goods at the wharf, fraudulently gave receipts for goods which he had not received, the principal was held not to be responsible because such receipt was not within the scope of the agent's authority.¹²

42. Construction of contracts conferring certain special kinds of authorities.

An authority to sell land is an authority to make a binding contract of the sale of such land and not a mere authority to

(a) Authority
to sell land.

1. Halsbury, Vol. I, 2nd Edn., Art. 374, p. 216.
2. *Collen v. Gardner* (1856), 21 Boar. 540.
3. *Wiltshire v. Sims* (1908), Camp. 258; *East India Co., v. Hensley* (1794), 1 Esp. 111; *Howard v. Braithwaite* (1812), 1 Ves. & B. 202, 208, 209.
4. *Pope v. Westcott*, (1894), 1 Q. B. 272, C. A.; *Hine Brothers v. Steamship Insurance Syndicate Ltd.* (1895), 72 L. T. 79; *Underwood v. Nicholls*, (1855) 17 C. B. 239; *Blumberg v. Life interests and Reversionary Securities Corporation, Ltd.*, (1897) 1 Ch. 171. The authority to receive money is to receive in cash, and not by a set-off, nor, in the absence of special custom, by bill of exchange or cheque—See Halsbury, Vol. I, 2nd Edn., p. 216, f. n. (q) *Seymour v. Bridge*, 14 Q. B. D. 460.
5. *Meehem*, S. 788 and authorities cited thereunder.
6. *Meehem*, S. 789.
7. *Ireland v. Livingston*, (1872) L. R. 5 H. L. 395; *Boden v. French*, (1851), 10 C. B. 886; *Miles v. Haslehurst & Co.*, (1906) 23 T. L. R. 142; *Cobridge S. S. Co. Ltd. v. Bucknell Steamship Lines, Ltd.*, (1910), 15 Com. cas. 138, C. A.; *Finn v. Shelton Iron, Steel and Coal Co., Ltd.*, (1924), 131 L. T. 213, C. A.; *Westminster Bank, Ltd., v. Hilton*, (1926), 136 L. T. 315.
8. *Bertram Armstrong & Co., v. Godfray* (1830), 1 Knapp. 381.
9. *Goluck Chundher Choudry v. Kanto Pershad Hazaree*, 15 W. R. 817.
10. *Eshan Chunder Singh v. Shama Churn Bhutto*, 6. W. R. (P. C.). 57.
11. See *Pearson's Law of Agency*, p. 201.
12. *Coleman v. Riches*, 24 L. J. C. P. 125.

find a purchaser as that of a real estate broker.¹ It is not necessarily an authority to execute a conveyance but may fall short of it and may be only an authority to enter into an agreement to sell on behalf of the principal which may be specifically enforced against him.² A mere request "to list property"³ or to endeavour to find a purchaser⁴ or mere inquiry as to the possibility of sale⁵ or a mere statement of the terms upon which the owner would be willing to part with it⁶ do not of themselves constitute such authority.⁷

Estate broker or house agent.

"A real estate broker or agent is one who negotiates the sales of real property. His business, generally speaking, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind the principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters besides fixing the price. The delivery of the possession has to be settled, generally the title has to be examined, and the conveyance with its covenants is to be agreed upon and executed by the owner. All of these things require conferences and time for completion. These are for the determination of the owner and do not pertain to the duties and are not within the authority of a real estate agent. For these obvious reasons, and other which might be suggested, it is a wise provision of the law, which withholds from such agent, as we think it does, any implied authority to sign a contract of sale in behalf of his principal". This is identically the language used in a number of cases to distinguish the position of a real estate broker or agent from that of an agent employed to sell land. He is merely a negotiator and not an agent to close the contract of sale.⁸ Thus, an estate or house agent authorized to procure a purchaser has no implied authority to enter into an open contract of sale. He must be authorized to make a binding contract of sale as there is a substantial difference between an authority to sell and an authority to find a purchaser.⁹

There is, however, nothing to prevent a real estate broker from being employed as an agent to sell the land as well, i. e., to enter into a binding contract for the sale, if the language employed or the circumstances of the case show that such a power was intended.¹⁰

The correspondence or negotiations between the parties may be such as to create the authority to make a binding contract

1. *Mechem*, §. 797 and authorities cited therein; see *Katlar* p. 183.

2. *Jackson v. Badger*, 35 Minn. 52.

3. *Halsey v. Monteiro*, 92 Va. 591.

4. *Mc Cullough v. Hitchcock*, 71 Conn. 401; *Durga Chandra Mitra v. Rajendra Narain Sinha*, 1923 Cal. 57.

5. *Mechem*, §. 798.

6. *Watkins Land Mortgage Co. v. Campbell*, 100 Tex. 542; *Simmons v. Kramer*, 88 Va. 411; *Prentiss v. Nelson*, 69 Minn. 496.

7. *Mechem*, §. 798 and cases cited therein.

8. See *Mc Cullough v. Hitchcock*, 71 Conn. 401, *Katlar*, pp. 184, 185.

9. *Durga Chandra Mitra v. Rajendra Narain Sinha* A. I. R. 1923 Cal. 57=77 I. C. 558=36 Cal. L. J. 467.

10. *Pringle v. Spaulding*, 53 Barb. (N. Y.) 17; *Rosenbaum v. Belson*, (1900), 2 Ch. 267 cited at p. 125.

to sell.¹ In *Jackson v. Badger*,² the owner wrote a letter to a real estate broker reading "You may sell my 40 acres, \$ 2,000, hand money, and the balance in three years with interest". It was held that the letter authorized the real estate broker to enter into a binding contract of sale of the land specified therein, although it was not sufficient to authorize a conveyance.

Authority to sell was also inferred from letters as follows:—

"Sell my farm for me at ten dollars per acre, or as much more as you can get."³ "While now sell \$ 250 per foot, a regular commission of two and a half per cent to you after sale is made and closed."⁴ "I will sell the lots for \$ 19,000, and pay you 5 per cent. commission, plus \$ 50 or \$ 100 commission in all for making the sale Terms, \$ 3000 cash balance long time."⁵

To give an agent an authority to sell land it is not necessary that any particular phraseology be used or that the authorisation be made in any formal terms.⁶ The question, in every case where such authority is disputed, is whether the language used does sufficiently indicate that the agent was authorized to close a binding contract of sale. This may be merely a question of the construction of the words used, or it may be an inference of fact as to intention, to be decided like other similar questions.

Made of
conferring
authority
to sell

It is to be observed that the professional or ordinary business of a real estate broker being merely to find a purchaser and get the terms settled between the parties and not to enter himself into a binding contract of sale, the words indicating an intention to engage him, will be presumed to have been addressed to him in his ordinary or professional capacity, and unless they indicate, in clear terms, that the vendor went further than this and conferred an authority to make the contract of sale as well on his behalf, no such authority will be inferred. The authority intended to be conferred must have been completely agreed upon and vested, and mere preliminary correspondence or negotiations are not enough to confer an authority to sell. If, therefore, the dealings between the principal and the agent have not passed beyond the stage of preliminary correspondence, if the terms upon which the authority is to be executed or the property sold, are not yet fully determined, if further communications are to be had with the principal, or further assent is necessary before the authority is to be executed or exercised, and the like, there can, ordinarily, be no present authority to sell in such case as to bind the principal.⁷

A mere authority to negotiate a sale of land, or even authority to make a binding contract for its sale, of itself, involves no authority to actually convey it.⁸ Hence a mere authority to

When author-
ities to sell
land should
be under
seal or
registered,

1 See Katlar, p. 185 and the American authorities cited therein

2 35 Minn. 52 (Amer.).

3 *Stewart v. Wood*, 63 Mo. 252 (Amer.)

4 *Glass v. Rowe*, 103 Mo. 513 (Amer.)

5 *Colvin v. Blanchard*, 101 Tex. 231 (Amer.)

6 *Mechem*, p. 572.

7 See Katlar, p. 187, and the American authorities cited therein.

8 See *Delano v. Jacoby*, 96 Cal. 275 (Amer.) ; *Dayton v. Nell*, 43 Minn. 246 (Amer.)

sell land may be conferred orally or in writing and does not require an instrument under seal.¹ But where the authority conferred is not confined merely to the sale of land, but also empowers the agent to convey it, i. e. to complete the sale by the execution of a properly drawn up conveyance under seal and delivery of possession where necessary, it requires an instrument under seal or registered inasmuch as no agent, who is not authorised by a power of attorney under seal or registered can execute a conveyance which is required by law to be under seal or registered.² So where authority to sell land is only verbal or written and not registered or under seal it does not authorize the agent to execute a conveyance but only to sell the land; but where it is under seal or registered, a general power to sell and dispose of real estate contained in it carries with it the power to execute all the instruments necessary and proper to complete the sale and carry it into effect in the ordinary way, unless there is something in the instruments or in the circumstances surrounding its execution by which its scope is limited.³

Authority to
sell land
cannot ordi-
narily be
inferred from
mere general
authority
to act

Authority to sell land must ordinarily be conferred in clear and direct language, for, although there may be cases in which it may arise by implication, it is not lightly to be inferred from express power to do other acts, or brought within the operation of mere general terms.⁴ A power of attorney, therefore, 'to act in all my business, in all concerns, as if I were present, and to stand good in law, in all my land and other business'⁵ or 'to ask, demand, recover, or receive the maker's lawful share of a descendant's estate, giving and granting to his said attorney his sole and full power and authority to take, pursue and follow such legal course for the recovery, receiving and obtaining the same as he himself might or could do, were he personally present, and upon the receipt thereof, acquittance and other sufficient discharges for him and in his name to sign seal and deliver'⁶ or 'to make contracts, to settle outstanding debts and generally to do all things that concern my interest in any way real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself as he may deem proper and expedient'⁷ or 'to attend to the business of the principal generally';⁸ or 'to act for him with reference to all his business,' or 'to locate and survey land,'⁹ or to sell claims and effects,¹⁰ gives no authority to sell land. Similarly, a power of attorney to ask, demand and receive of and from any person or persons all such real and personal estate as I may be entitled to by virtue of my being a son and heir at law of

1. See *Jackson v Badger*, 35 Minn 52 (Amer.); *Donnell v Currey*, 131 S. W. 88; See also *Mechem*, §. 229 and the cases cited therein.
2. See notes on p. 73, see also *Mechem*, s. 811.
3. *Ibid*; See also *Katlar*, p. 188.
4. *Mechem*, §. 802.
5. *Ashley v Bird*, 4 Am. Dec. 313.
6. *Hay v Mayer*, 34 Am. Dec. 453.
7. *Billings v. Morrow*, 68 Am. Dec. 235, *Hunter v Sacramento Valley Beet Sugar Co.* 11 Fed. 15 (Amer.)
8. *Coquillard v. French*, 19 Ind. 274, See also *Hodge v Combe*, 17 L. Ed. 157.
9. *Moore v. Lockett*, 4 Am. Dec. 683; *Mitchell v. Mc Laren*, 51 S. W. 269. (Amer.)
10. *De Cordova v. Knowles*, 37 Tex. 12 (Amer.)

(a named person)"¹ "to accept and receive all sums of money, to collect and pay, to sue and be sued, to give notes and receipts, and to accept the same, and in his name to make seal, deliver and acknowledge,² etc., nothing being said of land, was held not sufficient to authorise the agent to sell and convey land.

Where A wrote to C "I wish you to manage (my property) as you would with your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties who will come into San Antonio will be glad to purchase my gas stock and real estate," it was held that C was thereby authorized to contract for the sale of the real estate, but not to convey it.³ So the authority "to use the the land to enable the donee of the power to extricate himself from his financial embarrassments," was held to authorise a sale or a mortgage of the land.⁴

A power to do any lawful act for and in my name as if I were present was held sufficient to authorise a sale and conveyance of land, the court observing: "This is universal power of attorney, but its operation will be by law restrained to the particular business, in which, it is presumed, the intention was to delegate the authority.⁵ Instructions given by an owner of real estate to an agent to sell the property for him and an agreement to pay a commission on the purchase price accepted, are sufficient to constitute an authority to sell land including an authority to sign an agreement for sale.⁶

It is also necessary that the instruments conferring the authority shall show, with reasonable preciseness and certainty, not only what lands are to be the subject matter of the power, but also what interests or estates therein are to be sold,⁷ although it need not be construed as strictly as the authority to convey. For instance, a power of attorney authorizing the agent "to bargain, sell, grant, release and convey and upon such sales, to execute convenient and proper deeds with such covenants as to my said attorney shall seem expedient, in due form of law, as deed or deeds, to make, seal, deliver and acknowledge," although it is silent as to what the agent is to sell and convey, clearly contemplates a sale of lands and is held to be sufficiently broad to authorize the agent to sell and convey, whatever estate the principal then had.⁸ So also a power of attorney in due form authorising the agent "to sell, bargain and convey three certain lots of land in the village of Pentwater belonging to me," without any further specification was held sufficient where the principal had three such lots and only three in that village.⁹ But an authority to convey a piece of

Specification
or descrip-
tion of land
forming the
subject of
authority

1. *Hotchkiss v Middlekauf*, 43 L. R. A. 806

2. *Gee v. Bolton*, 17 Wis. 604. See also *Bean v. Bennett*, 35 Tex. Civ. App. 298. (Amer.)

3. *Lyon v. Pollock*, 25 L. Ed. 265. (Amer.)

4. *Baker v. Byerly*, 40 Minn. 488.

5. *Veatch v. Gilmer*, 111 S. W. 746 (Amer.)

6. *Rosedbaum v. Belson*, (1900), 2 Ch. 267 cited at p. 125

7. *Menhom*, S. 804.

8. *Marr v. Givan*, 39 Am. Dec. 600.

9. *Vaughn v. Sheridan*, 50 Mich. 155 (Amer.) See also *Crimp v. Yokely*, 20 Tex. Civ. App. 231.

land in Colebrook belonging to the Bank, there being more than one such piece, was held to be too indefinite to be given effect to.¹ An authority to sell all the lands which the principal may own or all which he may own and lying within a certain territory, is good without a more specific description.² So is also an authority to sell any or all of the principal's property and to execute all necessary instruments.³ An authority to sell any or all of the principal's land in the state includes authority to sell any specific tract therein. Where the land to be sold is sufficiently described in a power and is capable of identification, the mere fact that the principal apparently intended to add a more specific description but failed to do so, will not vitiate such power.⁴ Where a power of attorney authorised the sale of the one half of a lot of land without specifying which half and whether in common or in severalty, it was held that the agent was justified in selling the one half in severalty and in exercising his own discretion to decide which half he would sell.⁵ An agent authorized to sell and convey a piece of land except such parts as his principal had previously conveyed may convey a part which the principal had previously sold but not conveyed.⁶ It has been that a general authority to sell any of the principal's real estate empowers the agent to sell even that which the principal subsequently acquires,⁷ where the power expressly refers to lands which the principal 'does or may' own.⁸ But where the power clearly contemplates the inauguration of a business and authorises the agent "to buy and sell" lands the authority to sell given thereby is limited to the land brought thereunder.⁹ So also where the principal owns or is interested in, at the time of the execution of the power, a conveyance of subsequently acquired land is not authorised.¹⁰

Time—time
for sale

Time again is of great importance in all contracts of agency for sale of lands, as the value of land like any other property is constantly fluctuating. So, where a definite time is fixed by the clear language of the power, any sale after that time will be *ultra vires* and therefore inoperative, unless the principal waives the limitation or ratifies the sale.¹¹ Likewise, an authority "to sell lands at a given sum, if they can be sold immediately" will not authorise a sale at that price a month afterwards, without any further authority,¹² nor can an agent empowered to sell real estate at a given price, without further instructions, sell it at the same price, after a considerable time when the land

1. *Lumbard v. Aldrich*, 28 Am. Dec. 381.

2. *Munger v. Baldrige*, 41 Kan. 236; *Roper v. Mc Padden*, 48 Cal. 346 (Amer.), *Kane v. Sholars*, 41 Tex. Civ. App. 154. (Amer.)

3. *Marshall v. Shibley*, 11 Kan. 114 (Amer.)

4. *Bradley v. Whitesides*, 55 Minn. 454 (Amer.)

5. *Alemany v. Daby*, 36 Cal. 90 (Amer.)

6. *Mitchell v. Maxpin*, 3. T. B. Mon. (Ky) 185.

7. *Fay v. Winchester*, 4 Metc. (Mass) 513; *Benachote v. Lath*, 24 Neb. 251, *Benachote v. Atkins*, 25 Neb. 645.

8. *Perje v. Judd*, 22 Minn. 287; *Bigelow v. Livingston* 28 Minn. 57.

9. *Grave v. Coffin*, 14 Minn. 345; *Allis v. Goldsmith*, 22 Minn. 123.

10. *Turner v. Mc Donald*, 76 Cal. 177 (Amer); *Penfold v. Warner*, 96 Mich. 179.

11. *Henry v. Lane*, 128 Fed. 243 (Amer)

12. *Mathews v. Sowle*, 12 Neb. 398.

has greatly increased in value.¹ But an authority to sell land within a "short time" was held sufficient to authorise a sale made within two weeks even though in the meantime the land had increased in value.²

The principal is entitled to prescribe the terms on which the sale should be effected, and the persons having or charged with notice of these terms can acquire no rights against the principal upon a contract of sale which ignores or substantially deviates from them.³ Thus, an authority "to sell real estate in lots as surveyed by a person named therein" does not empower the agent to sell the whole tract for a gross sum or at so much per acre,⁴ nor an authority to sell for \$ 5,000, one half cash" is satisfied by an agreement to sell for \$ 5,000, \$ 2,000 cash, \$ 2,000 in three weeks and the balance on time,⁵ or one "to sell on time with interest on deferred payments" by a sale "for cash";⁶ or one "to sell lands if they could be sold for a certain price" "by a sale" partly for cash and partly on time and binding the seller to furnish an abstract of title, and pay taxes and interest on an existing mortgage up to a future date."⁷ Similarly, an agent authorized "to make the purchase price payable in three years" has no implied authority to make it payable "on or before three years."⁸

How far
terms of
authority
binding

An authority to sell at auction does not justify a private sale,⁹ nor an authority to sell to one specified person authorises the sale to another person.¹⁰ nor an authority to sell for one price allows a sale for a less price.¹¹ An authority to sell, the vendee to pay certain mortgage, does not justify a sale, the vendee to "assume" such mortgages unless, perhaps, where they are not yet due.¹²

Where, however, an agent is authorised to sell partly for cash and partly on time, the proportions not having been fixed by the principal, the agent has discretion to fix the proportion and a sale for more than one-third cash, one-half of the remainder in three years and the balance in five years with six per cent. interest secured on a mortgage was held well within the terms of the authority.¹³ Where the authority is to sell, the payments to be made in three equal instalments, the addition of a clause, providing that if the instalments are not paid at the time specified, the contract shall be liable to forfeiture at the option of the seller, does not vitiate the sale.¹⁴ So also an authority to sell making "one-half payable on or before one

1. *Wasweyler v. Martin*, 78 Wis. 59. But see and compare *Hartford v. Gillicuddy* 103, Mo. 224.
2. *Smith v. Fairchild*, 7 Colo. 510. (Amer.).
3. *Mechem*, §. 807; *Katlar*, p. 192.
4. *Rice v. Traveller*, 83 Am. Dec. 878.
5. *De Sollar v. Hanscome*, 39 L. Ed. 956; *Speer v. Craig*, 16 Colo. 478 (Amer.).
6. *Hartenboer v. Uden*, 242 Ill. 434 (Amer.).
7. *Staten v. Hammer*, 121 Iowa. 499 (Amer.).
8. *Jackson v. Badger*, 35 Minn. 52 (Amer.).
9. *Davis v. Gordon*, 87 Va. 559 (Amer.).
10. *Breen v. Bires*, 16 App. Div. (N.Y.). 632.
11. *Field v. Small*, 17 Colo. 386 (Amer.).
12. *Schultz v. Griffin*, 121 N. Y. 294 (Amer.).
13. *Smith v. Keeler*, 151 Ill. 518 (Amer.).
14. *Mc Laughlin v. Wheeler*, 1 S. D. 497 (Amer.).

year" is satisfied by a contract to sell making "one-half payable" in one year¹ and an authority to sell for certain sum "about one half cash" justifies a sale for that sum cash and the balance on time.² The criterion to judge, therefore, whether a sale is vitiated on this ground is whether the sale contradicts the terms of the authority to the prejudice of the principal or it only adds certain terms not inconsistent with the terms of the authority and not beyond the province of the discretion left by the principal to be exercised by the agent. If the former is the case, the sale is vitiated, while in the latter case it is quite within the authority and, therefore, valid and binding on the principal.³

Authorities
by impli-
cation

An authority to make a binding contract for the sale of land will, where there is nothing to indicate a contrary intention, carry with it, by implication, the authority to make a contract in writing, where that is requisite or proper,⁴ to make it in the usual form and to include within it all usual and reasonable terms and provisions to accomplish the desired end. For instance, all such common provisions as find place in well-drawn contracts of this nature respecting remedies, time and place of performance, the effect of failure to perform and the like are well within this rule and an agent authorised to sell land has implied authority to insert them in the contract of sale.⁵ But an authority to sell land does not imply an authority to convey, and unless specifically authorised in that behalf he has also no implied authority to mortgage or exchange or gift or to give option to buy or to permit waste or sale of timber separate from the land or to change its boundaries or to partition it⁶ or to dedicate it to the public use or to convey it to pay the principal's debts or to assign it to his creditors,⁷ or to convey it to his own debts⁸ or in trust for the support of the principal's child⁹ or to rescind or alter the contract of sale after it is effected or to release or discharge the principal's mortgages or to invest the proceeds of the sale or to give credit for the price¹⁰ He must sell it only for consideration which moves to the principal. The land always presumably represents value and if the agent sells and conveys it, it must be expected that he is to obtain something like a substantial equivalent. A parol authority to sell land in America has been held as not sufficient to authorise the agent to receive payment of the purchase money. A mere authority to receive the immediate payment does not imply

1. *Deakin v. Underwood*, 37 Minn. 96 (Amer.).

2. *Witherell v. Murphy*, 147 Mass. 417, (Amer.).

3. See Katjar, p. 194.

4. *Johnson v. Dodge*, 17 Ill. 483. (Amer.).

5. See Katjar, p. 194 citing *Kilpatrick v. Wiley*, 197 Mo. 123; *Gund Bros. Co. v. Tourtelotte*, 108 Minn. 71. But an agreement to reimburse the purchaser if he lost a half of the land, and also one to the effect that the buyer might have the rents from the property during the pendency of the negotiation are held to be beyond the rule. See *Funch v. Church* 132 Iowa 1. (Amer.).

6. Katjar, p. 195 and the American authorities cited therein.

7. *Skirvin v. O'Brien*, 43 Tex. Civ. App. 1 (Amer.).

8. *Gourlay v. Carson*, 16 Viet. L. R. 860.

9. *Coulter v. Portland Trust Co.*, 20 Or. 469.

10. See Katjar, p. 196, and the American authorities cited therein.

an authority to receive subsequent payments.¹ But where the price is agreed to be paid by instalments, and the agent is required to convey the land after the instalments are paid off, he has implied authority to receive payment of all the instalments.² Although a mere authority to sell land does not imply an authority to convey, yet a general power to sell and dispose of land if executed with the necessary formalities carried with it the power to execute all the instruments necessary and proper to complete the sale and to carry it into effect in the ordinary way and to insert usual covenants of warranty where such sales are usually made with such covenants, but not to make any unusual or special warranty as of the quantity or quality of the land sold unless the agent is authorised to sell the land on such terms as he shall deem most eligible.³ The fact that the agent inserts an unauthorised warranty will, however, not ordinarily prevent the deed from taking effect as a conveyance. An agent, authorised merely to sell land, has thereby, ordinarily, no implied power to bind his principal by representations concerning the value of the land or concerning its quality or even quantity although misrepresentation as to quality or quantity may furnish the purchaser a good ground for the rescission of the contract of sale. Representation as to the location of the land and its boundaries, however, are well within the scope of such agent's authority as being either necessary or usual. "In the sale or exchange of a tract of land, it is usual and necessary that the seller point out to the prospective buyer the boundaries of the tract—that he exhibits the thing he offers for sale to the view and inspection of the prospective buyer." Representation as to title, other than usual covenants of warranty of which mention has already been made, and waiver of the principal's claim of title, are not usually within the power of an agent merely authorised to sell.⁴

Authority to purchase land must be distinguished from a mere authority to find out land for purchase. Authority to purchase land is an authority to make a binding contract of purchase, i. e., to make a contract of purchase which may be binding on the principal. A mere authority to negotiate a purchase or to find out a seller is not such authority.⁵

(b) Authority to purchase land.

The authority to purchase may be conferred in writing or even verbally⁶ and need not be under seal or registered.⁷ It is generally express, but may also arise by implication. As an instance of it, it has been cited that the managing officer of a railway in process of construction would, undoubtedly in many cases, have implied authority to purchase land necessary for a right of way.⁸ So also, the managing agent of a principal

How authority conferred.

1. See Katiar, p. 196, and the authorities cited therein.
2. *Peck v. Harriott*, 9 Am. Dec. 415.
3. See Katiar, p. 197, and the American authorities cited therein.
4. See Katiar, pp. 197, 198, and the authorities cited therein.
5. Mechem, §. 842.
6. Mechem, §§. 841 and 230.
7. *Ibid.*
8. See *Johnson v. Railway Co.*, 116 N. Car. 926 (Amer.)

generally engaged in buying and selling land has such authority.¹ In fact the managing agent of any other enterprise may also have the implied authority to purchase land, when it is essential to do so to accomplish the object confided to his care.²

What other powers it implies.

An authority to purchase land implies an authority to make a binding contract of purchase.³ It is generally specially confined to the purchase of a particular piece of land and on the terms specified. But, where the agent is not limited by the authority as to the subject matter or terms, he has implied authority to select the land and agree upon the terms within the range of what is usual and reasonable.⁴ Where the settlement of the terms of purchase is left to the discretion of the agent, the authority is usually regarded as personal and not capable of delegation or entitling the agent to agree that the price should be fixed by arbitration.⁵

An agent authorised to purchase land has generally implied authority to bind the principal for ordinary and necessary expenses involved in such purchase, and not expected to be paid in the first instance by the agent himself; as, for example, for necessary recording fees, abstract charges, or the charges of an attorney reasonably employed to pass upon the title.⁶

Ordinarily the duty of an agent engaged to purchase land ends when he has made a binding contract of purchase, and it is not within his implied authority to pay the consideration and receive the deed. But where he is authorised to close the transaction and specially where his authority extends to the payment of the price upon the delivery of the deed, he would be authorised to receive the conveyance and pay the price.⁷ The deed, of course, must be taken in the principal's name. The contract is nevertheless binding on the principal even where the purchase is made by such agent in his own name and the principal's name is disclosed after the bargain is struck.⁸ Where he purchases land subject to a mortgage he has implied authority to bind the principal by accepting a deed which provides that the purchaser shall assume and pay the mortgage.⁹ But he has no implied authority to sell or mortgage the land so purchased even for payment of such mortgage unless specially authorised inasmuch as his authority to purchase is generally exhausted when the purchaser is consummated.¹⁰

(c) Authority to give land on lease.

Authority to lease may be conferred either orally or in writing and need not, generally, be registered or under seal except where the lease is required to be registered or sealed in which case it should be conferred by a power of attorney

1. See *Schley v. Fryer*, 100 N. Y. 71 (Amer.)
2. See *Mechem*, S. 841.
3. *Ibid.*, S. 842.
4. See *Katlar*, p. 199 citing *Brock v. Pearson*, 88 Cal. 581 (Amer.), *Windsor v. St. Paul, etc. Railway Co.*, 37 Wash. 156.
5. *Talmadge v. Arrowhead Reservoir Co.* 101 Cal. 367. (Amer.)
6. See *Egan v. De Jonge*, 113 N. Y. Sup. 737. (Amer.)
7. See *Mechem*, S. 845.
8. *Waller v. Hendon & Cox*, 22 E. R. 44.
9. *Schley v. Fryer*, 100 N. Y. 71.
10. See *Mechem*, S. 847; *Katlar*, p. 200.

duly executed and registered, according to the law for the time being in force for the registration of documents.¹ Leases of immoveable property from year to year, or for any term exceeding one year, or receiving a yearly rent are required by law to be compulsorily registered.² Hence authority to give such leases must be conferred by power of attorney duly executed and registered.³ But the Provincial Governments are authorised to exempt from registration leases for five years or less, the amount reserved by which does not exceed fifty rupees,⁴ and where such exemption applies agents may be authorised, verbally or in writing only, to give such leases.

An authority to lease land may be express or it may be implied but it must be clear.⁵ It is not implied from the mere authority to sell or to care for property or to collect rents or to exhibit the property to prospective tenants.⁶ Where a non-resident owner of lands left them in charge of his brother who being temporarily absent, deputed another person to "collect rents, procure tenants, and otherwise look after the property," it was held that the deputy had no power to bind the owner by a lease for a definite term.⁷

An authority to "manage" property is more comprehensive and may imply an authority to lease⁸ where such implication is warranted from the circumstances of the case. So where an agent was authorised "to act as our agent for our properties and honestly and diligently manage said properties" for the term of one year, the properties embracing farms, mineral lands and wild lands, the court held that although leases for ordinary terms in the ordinary forms were authorised, yet the authority did not authorise a sale or an exclusive grant of a quarry to take and sell stones from the lands for a term of fifteen years.⁹

Estate agents as such have no general authority to enter into contracts for their employers. Their business is to find offers and to submit them to their employers for acceptance. If any authority to enter into a contract is relied on in any case it must be proved and cannot be inferred from the relations existing between the parties.¹⁰ Where the owner of an estate, in answer to an enquiry from an intending lessee, said: "A manages all my affairs and you are to treat with him," it was

1 See *Mechem*, §s. 212, 229

2 See Section 17, Indian Registration Act, 1908, § 107, Transfer of Property Act, 1882.

3 See notes on page 73.

4 S. 17, Indian Registration Act, 1908, § 107, Transfer of Property Act, 1882

5 See *Bonnazza v. Schlitz, Brewing Co.* 115 Mich 36; *Howard v. Carpenter*, 11 Md. 259 (Amer.)

6 See *Katlar*, p. 201 and the American authorities cited therein

7 *Owen v. Swanton*, 25 Wash 112 (Amer.)

8 See *Duncan v. Hartman*, 143 Pa. 595 (Amer.), and other cases cited in *Mechem*, §. 830.

9 *Duncan v. Hartman*, *supra*.

10 *Thuman v. Best*, 97 L. T. 239. See also *Goluckmoner v. Assimooddeen*, 1 W. R. 56; *Ooma Tara v. Peesa Bibbee*, 2 W. R. 155; *Punchanan v. Peary Mohan*, 2 W. R. 225; *Kalee Kumar v. Anees*, 3 W. R. 1; *Unnoda Pershad v. Chunder Sekhar*, 7 W. R. 394; *Ras Mooranee Dass v. Bucha Singh*, 4 M. W. P. 122, *Kenny v. Mookta*, 7 W. R. 419; *Sheo Shankar v. Dhurm Joy*, 8 W. R. 360.

held that this did not imply that A had authority to enter into a binding agreement for a lease.¹

What it
implies

Like other agents, the agent to lease must in order to bind the principal, confine his acts within the terms and conditions of his authority.² For instance, an agent authorised to lease an entire plot for a given period for a stated rent beginning at a certain time may not bind his principal by a lease of a part of the land for a different rent and for a term beginning at a different time.³ So also an agent authorised to lease for a certain term is not empowered to lease it for that term with a clause of renewal.⁴ Similarly, a power of attorney, given to a life-tenant to lease for twenty-one years or for one, two or three lives, does not authorise him to lease for ninety nine years determinable upon three lives.⁵ Where, however, the authority of the life tenant was to lease the property for such term or terms of years as she may deem proper, provided that no such term or terms should exceed the period of fifteen years or should contain any clause of renewal and that nothing in the power should be construed to authorise a lease for a longer period than 15 years, it was held that the power of the tenant was not exhausted by one lease for fifteen years, and that she might, at the expiration of one term of fifteen years, make another lease for a term not exceeding fifteen years.⁶ A farm bailiff or agent used to let farms upon ordinary terms and to receive rent has no authority to let upon unusual terms unknown to the owner.⁷

Authority to lease carries with it, by implication, the power to execute and deliver the necessary or usual documents, to make them in the ordinary form, and to insert in them the usual and ordinary terms, covenants and conditions.⁸ It has been held that under a general power to let the agent is justified in making a necessary and usual covenant to repair the premises,⁹ or to furnish heat.¹⁰

An agent authorised to lease land, like an agent authorised to sell land, has implied authority to make representations as regards the location of the land or other premises to be leased and the boundaries thereof, as these constitute the necessary items of information for the transaction.¹¹ He has also implied authority to make such representations concerning the general ownership of the premises, the right to lease them at that time, the determination of previous interests and the like, as are naturally and usually involved in such transactions.¹² He is

1. *Ridgway v. Wharton*, 27 L. J. Ch. 46. See also *Collen v. Gardner* 21 Beav. 540.

2. *Mechem*, § 831.

3. *Boisderre v. Den*, 106 Cal. 594 (Amer).

4. *Schumacher v. Pabat Breuing Co.*, 78 Minn. 50.

5. *Roe d. Brune v. Pridcaux*, 10 East. 158.

6. *Taussig v. Reel*, 134 Mo. 630.

7. *Turner v. Hutchinson*, 2 F & F. 185.

8. See *Katlar*, p. 203 citing *White v. Clow*, 135 Ill. App. 464; *Mc Michen v. Brown*, 10 Ga. App. 506; *National Loan Co., v. Bleasdale*, 140 Iowa, 695.

9. *White v. Clow*, 135 Ill. App. 464 (Amer)

10. *National Loan Co. v. Bleasdale*, 140 Iowa 695.

11. *Matteson v. Rice*, 116 Wis. 328 (Amer), and other authorities cited at p. 203 of *Katlar's Law of Agency*.

12. *Mullens v. Miller*, 22 Ch. D. 194. But not after the transaction is closed. *Pinck v. Causer*, 107 Va. 124.

authorised to make representations and to give information as to the facts concerning those matters which it is important for a prospective tenant to know, which are usually inquired about, and which are not often to the tenants' observation.¹ If a false representation is made by the agent of such facts, the principal is liable in costs to the tenant for any loss occasioned to him by such representation, notwithstanding any limitation on the authority of the agent to make such representation of which the tenant had or could have knowledge.²

Like an agent to sell land an agent to lease has implied authority to receive only so much rent as is to be paid as part of the transaction at the time of making the lease and not any subsequent instalments³ unless he is authorised to do so by the general and continuing character of his authority as an agent.⁴ Where he is authorised to receive rent he must receive it in cash and is not empowered to allow it to remain in arrears,⁵ or to be used to pay his own debts.⁶ Authority to lease generally implies an authority to make a lease which is to take effect immediately and not at a future date.⁷ The fact that the authority is irrevocable during the life-time of the agent is immaterial in such cases and does not affect the consideration.⁸

An agent having authority merely to make a lease has, thereby, no implied power to subsequently change the terms of the lease so made, or consent to the substitution of the tenants or accept surrender of the lease. But where he is authorised by a general power to manage the premises, to lease them when vacant and collect rents, he has implied power to consent to the surrender of a lease, or to the substitution of tenants or to extend the terms of a lease, or to agree to a change of mode of cultivation, or to reduce the rent within reasonable limits, or to waive payment entirely during a time when the premises are untenable as the result of a fire, if, by so doing, he induced the tenants to remain till the repairs are made.

He has also implied authority to determine the tenancy and to give notice to quit.⁹ Without such general authority an agent merely to make a lease has no authority to renew it subsequently or to extend its terms.¹⁰ He can however, renew and extend an old lease whenever he is authorised to make a new lease to the same parties and upon the same terms.¹¹ An agent authorized merely to lease has ordinarily no power to agree to such an unusual stipulation as that the principal shall, without charge, irrigate the lands, or shall furnish agricultural supplies to the tenant for putting in his crop. Where, however,

1. See *Matteson v. Rice*, 116 Wis. 328; *Cornfoot v. Foeke*, 6 M. & W. 358.
2. See *Martin v. Richards*, 155 Mass. 381; *Williams v. Goldberg*, 58 Mis. 211;
3. See *Mechem*, §. 834.
4. *Ibid.*
5. *Johnson v. Hawlett*, 56 Tex. Civ. App. 11 (Amer).
6. *National Loan Co. v. Bleasdale*, 140 Iowa. 695.
7. See *Taussig v. Reel*, 134 Mo. 530 (Amer).
8. *Rod Brune v. Pridoux*, 10 East. 158 (Amer).
9. See *Katlar*, pp. 204, 205, and the American authorities cited therein.
10. See *Mechem*, §. 837.
11. *Pittsburgh Mfg. Co., v. Fidelity Title and Trust Co.*, 207, Pa. 223 (Amer.), *Steverwald v. Jackson*, 123 App. Div. 569 (Amer.)

the authority is a general authority to lease on such terms as he may deem best, he can bind the principal for the supply of stock and other agricultural necessities but he cannot do so if he lets out his own lands along with the principal's.¹

An authority to lease does not include a power to bind the principal on a partnership agreement in respect of the use of the land, or an agreement to effect improvements thereon.² It does not imply, ordinarily, a power to release or waive the principal's lien for unpaid rent on crops or other property whether such lien is contractual or statutory.³ But where the authority is general empowering the agent to lease, collect rents, direct repairs, authorise a tenant to sell crops to pay taxes and purchase fencing, etc., and do other acts indicating a general scope thereof, it is held to include the power to release or waive such lien.⁴ Such authority, however, howsoever broad its terms and even where it includes an authority to sell, does not authorise the agent to mortgage the lands,⁵ or to license a telegraph company to erect poles in the highway in front of the land,⁶ or to recognize an outstanding title asserted by a third person in respect of the lands leased,⁷ or to convey the lands in settlement of the claims.⁸

(d) Authority
to take land
on lease

An authority to take land on lease like an authority to purchase may be conferred orally or in writing and, as the execution of authority does not require a deed under seal or registered,⁹ it is generally express, but may also arise by implication, where the taking of a lease falls within the ordinary scope of the business entrusted to the agent.¹⁰

It has been held that an agent authorised to take a lease has generally no implied authority to bind his principal by extraordinary covenants such as to repair the premises so as to make them suitable for his principal's purposes or to rebuild them in case of fire.¹¹ Where, however, an agent was authorised by a principal, who lived in another State, to take a lease in the State in which the agent himself resided, and on the lessor's refusal to give credit to the principal gave his own note, it was held that the agent was entitled to recover the amount, which he had to pay, under such note, to the lessor from the principal.¹²

(e) Authority
to receive or
make
payments.

The cases arising under this head may be classified as follows:—

(1) Where a person alleging himself as agent of another claims payment of debt due to such other person from the debtor;

1. Katlar, p. 205 and the authorities cited therein
2. *Providence Machine Co. v. Browning*, 72 S. C. 424 (Amer) *Peddicord v. Berk*, 74 Kan. 286 (Amer.)
3. See Mechem, S. 839.
4. *Fishbaugh v. Spunangie*, 118 Iowa 337 (Amer.)
5. *First National Bank v. Hicks*, 24 Tex. Civ. App. 269 (Amer.)
6. *American Telegraph & Telephone Co. v. Jones*, 78 Ill. App. 372 (Amer.)
7. *Mr. Donald v. O'Neil*, 21 Pa. Sup. ct. 364.
8. *Wells v. Huddenburgh*, 11 Tex. Civ. Hpp. 3 (Amer.)
9. See notes on page 73.
10. See Mechem, S. 641; Katlar, p. 206; See also *Johnson v. Railway Co.*, 116 N. Car. 926.
11. *Halbut v. Forrest City*, 34 Ark. 246. (Amer.)
12. *Irons v. Cook*, 33 N. C. 203 (Amer.)

(2) where the debtor who has made payment, to one whom he alleges to be the agent of another, of the sum due to such other and claims protection by such payment against such other person ;

(3) where a person who, alleging himself to be the agent of another, makes payment of such other's money to his creditor or to a person to whom money is due from such other person, and claims a set off for such payment against a claim by such other person, and

(4) where a payment is required to be made as a condition precedent for the protection or accruing of any right and the person who claims such right to have vested in or accrued to him relies on a payment made by another which he claims as payment by his agent authorised in that behalf.¹

The first two of these cases are those in which authority to receive payment is in question, and the last two involve the question of the authority to make payment.

Authority to receive payments or to make collection, as it is sometimes called, is an authority involving trust and confidence of the highest degree. Hence where such authority is not expressly conferred law does not allow it to be inferred so easily as in the cases of other authorities but requires a stricter proof of it before it extends its protection to such payments or grants relief to such claims.² Nevertheless, where from the relation of the parties, or a previous course of dealing, or an established custom, or conduct working an estoppel, it can fairly and reasonably be inferred that one person is authorised to receive payment for another, payment to the former will bind the latter irrespective, ordinarily, of what may become of the money. But the mere fact that the agent was employed to make the loan or negotiate the contract, or draft the securities upon which the money is payable will not, as of course, confer upon him the incidental authority to receive a payment which may fall due upon such contract, even though there is a stipulation in such contract whereby the money is payable at the agent's office.³ Similarly, the mere possession of securities does not, by itself, warrant an inference of such authority. Take, for instance, the case of a bill or note. A person may be possessed of a bill or note payable to another person or to his order, but so long as the latter does not endorse the payment to him, he has no authority to receive payment of it.⁴ But where the bill or note is payable to the bearer or is endorsed in blank, its apparently lawful possession by one, whose real relation is not known, may be sufficient evidence of title, if not of agency, to make the payment to such person a valid payment.⁵ Similarly, possession coupled with other facts or acts manifesting an agency to manage, control or deal with the securities may be very potent evidence of authority to receive

Authority to
receive
payment

1. See Katlar, p. 230.

2. See Mechem, §. 933.

3. See Katlar, p. 231 and the American authorities cited therein,

4. See *Doubleday v. Kress*, 10 Am. Rep. 502 ; *Hair v. Edwards*, 104 N. H. App. 213 ; *Lawson v. Nicholson*, 52 N. J. Eq. 821.

5. *Woodbury v. Larned*, 5 Minn. 339 (Ainer.) ; *Owen v. Barrow*, 1 B. & P. N. E. 111.

payment.¹ It has been held, that although neither of these facts, namely the negotiation of the loan or possession of the securities, is, by itself, sufficient to warrant an inference of authority to receive payment, where both of them are combined a very strong case for the presumption of such authority is made out.² The rule is founded upon human experience, that the payer knows that the agent has been trusted by the payee about the same business and he is thus given a credit with the payer.³ If the principal by his conduct makes the payer to believe in good faith that authority to receive payment exists in his agent, or his allowing him to negotiate the transaction and then to retain the security would suggest, and the payer, acting on such belief *bona fide*, has made such payment, the principal is estopped to deny such authority in the agent.⁴

It is to be remembered that the above rule applies only so long as the possession of the securities continues with the agent and ceases to apply when the securities are withdrawn from the agent's possession.⁵ It is, therefore, the prime duty of the debtor, before he pays to the agent, to ascertain whether he is still in possession of the securities, for if they are withdrawn such payment will not be binding upon the principal unless express authority to receive payment is proved or the principle is estopped by his conduct to deny such authority.⁶ It is, however, not necessary that he should actually see and examine the securities on such occasion, it being enough if he has trustworthy information of the fact which he believes and relying upon it makes such payment as any reasonable man would do under the circumstances.⁷

It has also been held that as the protection afforded by this rule is meant only to protect the innocent payers and is based on the principle of estoppel, it is not available to a person who either actually knows the real state of things that the agent had no authority or had not, at the time of making such payment, aware of the facts which constitute the estoppel and was, therefore, not misled by any conduct of the principal. A payee, therefore, who at the time of making the payment did not know that the transaction was originally negotiated by the agent or that he was in possession of the securities cannot claim protection of this rule.⁸

An innocent payer may also seek protection by such payment where the principal has by a course of dealing or other

1 *Dawson v. Wombles*, 111 Mo. App. 532.

2 See Katiar, p. 232 and the American authorities cited in support of this proposition.

3 *Doubleday v. Kress*, 50 (N. Y.) 410; *Central Trust Co v Folsom*, 167 (N. Y.) 285

4 See *Mechem*, §. 936; *Crane v. Gravenewald*, 120 N. Y. 274 (Amer.)

5 *Gulford v. Stacer*, 63 Ga. 618 (Amer.), *Cooley v. Willard*, 34 Ill 68 (Amer)

6 See Katiar, p. 233 and the authorities cited therein. It would not avail him to prove that subsequent to a payment he discovered that the securities were in the actual custody of the attorney when it was made. For he could not have been misled or deceived by a fact the existence of which was unknown to him. Per Parker, J in *Crane v. Gravenewald*, 120 N. Y. 174.

7 *Crane v. Gravenewald*, supra.

8. Per Parker J. in *Crane v. Gravenewald*, supra.

conduct led him to infer, as any reasonable man would have done under the circumstances, that the agent was authorised to receive payment. For instance, where the principal has confided to a loan agent money to be invested and has relied upon the agent to select the security and to determine upon the loan, has permitted him to receive payment of the principal and interest when due, has allowed him to invest the proceeds from time to time, and has treated him as having general authority to manage his banking business, a payment made *bona fide* by an innocent person to such agent is binding upon the principal even though the agent was not in possession of the securities when the payment was made.¹

It must, however, be remembered that such an inference must be drawn with caution. For instance, where a principal has, on previous occasions, expressly authorised the agent to keep possession of the securities and to receive payments thereon, this fact will not furnish an evidence of the general character of authority and will not protect a payer who pays, when the securities concerned are not so confided to the agent,² or where the principal has refused to send the securities to the agent until the money had first been paid to him.³ The mere fact that the mortgages are purchased from a loan company and are payable at its office and that the purchaser knows that the company was systematically trying to get the borrowers to discharge their duty to pay taxes and insurance and to get them pay at its office as required, will not constitute the loan company agents of the purchaser to receive payment, when he retains the securities in his own possession or makes them over to another agent for collection.⁴ Similarly, the fact that on previous occasions such purchaser has expressly authorised the loan company to collect interest on such loans for him and every time has sent the securities, on which the collections are to be made to the company, will not warrant an inference of authority to collect subsequent instalments of interest and principal when the papers are not sent and no authority for such collections has been given.⁵ For the same reasons, the mere fact that an agent is, either expressly or by implication, authorised to receive the interest upon a principal sum, will not justify the inference, that the agent is authorised to receive the principal sum as well.⁶

Where the principal confides to an agent for delivery securities upon delivery of which money is to be lent or paid to or for the principal, the agent, in the absence of anything to indicate a contrary intention, would have implied power to receive the money, and payment to him would be effective even though the agent makes default and the money does not reach

1. See Katiar, p. 234 and the American authorities cited therein.

2. *Budd. v. Broen*, 75 Minn. 316 (Hmsl.) ; *Schen v. Dexter*, 77 Minn. 15 (Amer.)

3. *Security Co. v. Graybeal*, 85 Iowa. 543 (Amer.)

4. *Bradbury v. Kinney*, 63 Neb. 754.

5. See *Joy v. Vnnce*, 104 Mich. 97 (Amer.) and other authorities cited at p. 235 of Katiar's *Law of Agency*.

6. *Doubleday v. Kreen*, 59 (N. Y.) 110 (Amer.) ; See Katiar, p. 235.

the principal¹ So an agent authorised to negotiate a loan to his principal and entrusted with the possession of the securities on which the loan is to be made has implied authority to receive payment for his principal² Where an insurance company confides to an agent a policy for delivery such agent has implied authority to receive payment of the premium which is to be paid on such delivery³ but, of course, not the premiums that fall due subsequently⁴

Where an agent has general authority to carry on business as principal, he can do what the principal himself can do, and a receipt of money appertaining to such business by such agent will bar a claim to such money by the principal himself⁵ But an agent authorised only to invest money and receive interest thereon has no implied authority to give a valid discharge for the principal as well⁶ A person instructed by the owner to take cattle to a salesman for market has no implied authority to receive proceeds of sale unless there is custom or usage to that effect⁷ A clerk employed to obtain orders for goods has no implied authority, by reason thereof, to receive payment for the goods so ordered in the absence of special authority to that effect⁸ But a person authorised to sell and not merely to take orders or to find out a purchaser or only to negotiate the terms of sale, has implied authority to receive the proceeds of such sale,⁹ in as much as a person cannot avow the acts of his agent to one part of the transaction and repudiate them as to another¹⁰ But mere authority to sell i.e., to negotiate a contract of sale or to enter into a binding contract even, where possession was not to be delivered by the agent, has been held to be insufficient to warrant the inference of an authority to receive payment¹¹ Where a clerk was sent to a customer at his request to fetch money to be deposited at the Bank and through some cause for which he did not account the money was lost on his return, it was held that the receipt of the money from the customer was in the course of his employment as a clerk of the bank and the surety of the clerk was liable for it¹² But where a person was unauthorised to receive payment to the knowledge of the payer, a payment to him will not entitle the payer to a claim on the bank which employed him¹³ If the owner of goods allows a broker, through

1 *National Mortgage Co v Lush* 5 Kan App 633 (Amer) But see *Hunt v Poole*, 139 Mass 224 where delivery by a wife to her husband of a cheque payable to the order of a third person was held not sufficient to constitute the husband an agent of the wife authorised to receive payment of the cheque

2 *National Mortgage Co, v Lush*, *supra*

3 *Gosch v Fire Ins Assn* 44 Ill App 263 (Amer)

4 See *Mechem*, § 865 and the cases cited therein

5 See *Gardner v Davis*, 2 C & P 49

6 *River Clyde Trustees v Duncan* 21 L T 37

7 *Lettice v Judkins*, J L 7 Ex 142

8 *Puttock v Warr*, 31 L T 86

9 *Annon* 12 Mo Rep 230

10 *Capel v Thornton*, 3 C & P 352

11 *Drakeford v Percy*, 7 B & S. 515, *Livesey v Collin Campbell*, 1 ALJR 124

12 *Melville v Dodge*, 6 CB 450

13. *Russo-Chinesen Bank v Li Yan Sam*, 79 L J P C 60

whom he sells them, to sell them as his own goods, the purchaser is discharged by payment to the broker in any way which would have been sufficient if he had been the real owner.¹

This rule, however, does not apply where the principal's name is disclosed and the purchaser knows that the person is selling only as broker.² But the mere fact that the sellers of the goods were described in the catalogue of sale as brokers is not sufficient notice to the purchaser to prevent the rule from applying.³ Payment of price to a person found in a merchant's counting house and appearing to be entrusted with conduct of the business there, is good payment to the merchant, though it turned out that the person was never employed by him.⁴ But although a payment to an apprentice at the counting house of his master in the ordinary course of business may be good payment yet it is not so if made upon a collateral transaction. So a payment of a deposit by a stake holder to the apprentice of the party who has made the deposit at his counting house is not a good payment.⁵

An agent employed to sell an estate has not, as such, authority to receive payment.⁶ But the character of a general agent is sufficient to authorise him to demand and receive the fines payable on the removal of a lease.⁷

Authority to receive payment generally implies an authority to pass a receipt therefor or to execute a discharge where it is necessary or forms a condition precedent to the receipt of money.⁸ Although a mere authority to demand and receive payment of a debt would not imply authority to sue for it, yet as every endowment of power carries with it implied authority to do those things which are usual and necessary to accomplish the object sought to be attained, an agent having general instructions to collect may, if it becomes necessary, sue upon the claim, cause execution to issue, and direct the seizure of property⁹ and where he acts as agent to a non-resident principal, to indemnify the sheriff against the result of such seizure.¹⁰ He can also employ a counsel to conduct the suit.¹¹ Where a negotiable note or bill is payable to bearer¹² or is endorsed in blank,¹³ for the purpose of collecting, he may sue thereon in his own name, but not when it is payable to order and is not

Power implied in the authority to receive payment

1. *Coutes v. Lewis*, 1 Camp. 444; *Favene v. Bennett*, 11 East 36; *Blackburn v. Scholes*, 2 Camp. 341; *Campbell v. Hassell*, 1 Stark 233.

2. *Favene v. Bennett*, supra.

3. *Blackburn v. Scholes*, supra.

4. *Barrett v. Deere*, 1828 M. & M. 200.

5. *Sanderson v. Bell*, 2 Cr. & M. 304.

6. *Mynn v. Jolliffe*, 1 M. & R. 326.

7. *Mountnorris v. White*, 3 E. R. 931.

8. *Padfield v. Green*, 85 Ill. 529 (Amer.); *Lindley v. Lupton*, 118 Mich. 466 (Amer.); *Davison v. Wombles*, 111 Mo. App. 532.

9. See Illustration (a) to section 188 of the Indian Contract Act, 1872, cited at p. 105; *Joyce v. Duplessis*, 77 Am. Dec. 185. (Amer.).

10. *Clark v. Randall*, 9 Wis. 135 (Amer.). But he has no authority to indemnify after the levy and sale have been made. See *Snow v. Hix*, 54 Vt. 478.

11. *Ryan v. Tudor*, 31 Kan. 366; *Swartz v. Morgan*, 163 Pa. 195.

12. *Hotchkiss v. Thompson*, 1 Morris (Iowa), 156.

13. *Orr v. Lacy*, 4 Mc Lean (U. S. C. C.) 249.

endorsed.¹ His authority to sue, however, must be confined to the institution of the ordinary and appropriate claims for the collection of the debt, and cannot be deemed to justify unusual and inappropriate actions such, as for example, a criminal proceeding.² Where an agent is authorised merely to collect or receive payment of a claim, he has, therefrom in case of dispute no implied authority to submit the claim to arbitration,³ or to release the debt in whole or in part or to compromise the claims⁴ or to discharge some of the debtors,⁵ or to release him,⁶ or to discharge sureties, or to surrender securities⁷ without payment in full. He has no authority to allow for deficiencies, admit counter claims, or set-off, or recognise any other adverse claims.⁸ Where he is authorised to collect a bill he has no implied authority to receive conditionally less than the entire amount and to surrender the bills before learning whether the condition will be accepted.⁹ Where he is authorised merely to collect rents, he has no implied authority to accept surrender of the lease, or to consent to the discharge of the tenant and the substitution of a stranger.¹⁰ He has no implied authority to extend time or otherwise change the terms of the contract or to receive payment before maturity or to accelerate maturity.¹¹ For instance, where a mortgage deed provides that, if default be made in the payment of any interest, the entire principal sum shall, at the option of the mortgagor, become at once due and payable, an agent authorised merely to collect interest, has no implied authority, in case of such default, to exercise the option.¹²

A is authorised to receive payment of money. He has no authority—(1) to receive payment before the money is due, and if his authority be revoked before that time, the debtor is not discharged by such a payment;¹³ (2) to receive payment by cheque¹⁴ unless in the particular business in which he is employed

1. *Padfield v. Green*, 85 Ill. 529 (Amer.)

2. *Equitable L. Assn. Society v. Lester*, 110 S. W. 499, *Thompson v. Bacon Valley Rubber Co.* 56 Ounn 493

3. See *Manufacturers etc., Ins. Co. v. Mullen* 48 Neb. 620

4. See Katia, p. 239, and the authorities cited therein, See also *Ogilvie v. Lee* 158 Mo. App. 493, *Hooster v. Lange* 89 Mo. App. 234

5. *Torbet v. Heath*, 11 Colo. App. 492, *Gram v. Sichel*, 51 Neb. 828

6. *Couch v. Davidson*, 109 Ala. 313 (Amer.) But an agent authorised to collect a mortgage debt being empowered incidentally to realise the debt by the sale of the mortgaged property, can sell it and the mere fact that it does not fetch the price which would be sufficient to pay off the debt fully does not amount to a release of the lien so as to affect the purchaser's title *Winter v. Elevator Co.*, 88 Minn. 196 (Amer.)

7. *Kooche v. Whiteman*, 86 Mo. App. 568.

8. *Johnson v. Wilson*, 137 Ala. 468 (Amer.) But see *Sterenson Co. v. Fox*, 19 Min. 117, where a general agent was held authorised to make an allowance on a bill because of delays in performance.

9. *Bank of Scotland v. Dominion Bank*, 1891 A. C. 592

10. *Blake v. Dick*, 15 Mont. 236 (Amer.)

11. See Katia, pp. 240, 141 and the authorities cited therein.

12. See *Wilcox v. Earle*, 95 Kan. 459.

13. *Brenning v. Mackie*, (1862), 3 F. & F. 197.

14. *Pape v. Westcott*, (1894) 1 Q. B. 272; *Blumberg v. Life Interests, etc., Corporation*, (1897), 1 Ch. 171; (1898) 1 Ch. 27.

it is usual so to receive payment;¹ or (3) to receive payment by way of set-off or settlement of accounts between himself and the debtor.²

Where it is provided by the conditions at a sale by auction that the purchase-money for the goods sold shall be paid to the auctioneer, the auctioneer has no authority to receive a bill of exchange in payment; and if his authority to receive payment is revoked during the currency of the bill, such a payment does not discharge the purchaser.³ So, an insurance broker has no authority to take a bill of exchange in payment of a claim, of which he is authorised to receive payment.⁴

An agent is authorised to receive payment of an account, and to retain part of the amount in discharge of a debt due to him from the principal. He has authority, to the extent of his debt, to settle in his own way with the debtor of his principal.⁵

A authorises B, a stockbroker, to receive money due from C, also a stockbroker. B has no authority to settle with C by way of set-off.⁶

A authorises B, an insurance broker, to receive the amount due under a policy of insurance from the underwriters. The underwriters in good faith settle with B by setting off a debt due to them from him, and their names are struck out of the policy. By a custom at Lloyd's, a set-off is considered equivalent to payment as between broker and underwriter. If A was aware of the custom when he authorised B to receive payment, he is bound by the settlement. If he was not aware of the custom, he is not bound, because the custom is unreasonable.⁷

It has been held under the English law, and it is a general proposition of law, that authority conferred in general terms is construed as authority to act only in the usual way, and according to the ordinary course of business.⁸ In particular, an agent who is authorised to receive payment of money has, *prima facie*, no authority to receive payment otherwise than in cash, unless it is usual or customary in the particular business to receive payment in some other form, and the usage or custom in question either is a reasonable one, or is known to the principal, at the time when he confers the

1. *Bridges v. Gurrett*, (1870), L. R. 5 C. P. 451; *Walker v. Barker* (1900), 16 T. L. R. 393. As to payment by cheque payable to the agent's order, see *Bradford v. Price*, (1923), 92 L. J. K. B. 871.
2. *Underwood v. Nicholls*, (1855), 25 L. J. C. P. 79; *Sweeting v. Pearce*, (1859), 29, L. J. C. P. 266; *Legge v. Byas*, (1902), 7 Com. cas. 16. See Bowstead, p. 57.
3. *Williams v. Evans*, (1866), L. R. 1 Q. B. 352; *Sykes v. Giles*, (1839), 5 M. & W. 645.
4. *Hine v. S. S. Ins. Syndicate* (1895), 72 L. T. 79, C. A.
5. *Barker v. Greenwood*, (1836) 6 L. J. Ex. Eq. 54.
6. *Pearson v. Scott*, (1878), 9 Ch. D. 198; *Blackburn v. Mason*, (1893), 68 L. T. 510, C. A.; *Anderson v. Sutherland*, (1897), 13 T. L. R. 163.
7. *Sweeting v. Pearce*, (1859), 7 C. B. (N. S.) 449; *Todd v. Reid*, (1821), 4 B. & Ald. 210; *Burtlett v. Pentland* (1830), 10 B. & C. 760; *Stewart v. Aberdeen* (1838) 4 M. & W. 211; *Scott v. Irving*, (1830) 1 B. & Ad. 605; *Matvloff v. Crossfield* (1903), 51 W. R. 365.
8. Bowstead, p. 36.

authority.¹ A stockbroker is authorised to sell stock or shares. He has no authority to sell on credit, because it is not usual to sell stock or shares on credit.² On the dissolution of a partnership, authority is given to one of the partners by the co-partners—(1) to settle the partnership affairs,³ or (2) to receive all debts owing to, and to pay all debts owing by, the firm.⁴ In neither case has he authority to draw, accept, or indorse bills of exchange in the name of the firm. Where A is authorised to sell and warrant certain goods, he cannot bind his principal by a warranty given at any other time than at the sale of the goods.⁵

In *Williams v. Evans*,⁶ an auctioneer sold goods by auction, the conditions providing that the deposit should be paid to him at once, and the balance of the purchase-money on or before delivery. The purchaser duly paid the deposit, and on delivery of the goods gave the auctioneer a bill of exchange for the balance. Before the bill matured, the principal revoked the auctioneer's authority to receive payment, and gave notice of the revocation to the purchaser. *Held*, that the purchaser was not discharged by the payment to the auctioneer, it not being shown that he was authorised or that it was customary, to take bills of exchange in payment.

A payment to an agent who is known to be such must be in cash in order to bind the principal, unless he authorised the agent or held him out as having authority, to receive payment in some other form.⁷ But a custom in a particular business to receive payment by cheque is reasonable and binding.⁸

An insurance broker, being authorised to settle and receive payment of a claim under a policy, takes a bill of exchange from the insurer in payment of a general account, including the claim in question, and subsequently discounts the bill, which is duly paid by the insurer. The broker fails without having paid his principal. The principal is not bound by the payment to the broker, it being contrary to the usual custom (in England) for an insurance broker to receive payment by a bill of exchange.⁹

It has been held that a mere authority to collect does not authorise the agent to sell the debt to be collected¹⁰ or to deal with the funds collected or to receive goods or a negotiable

1 Bowstead, p 56.

2 *Wiltshire v Sims* (1808), 1 Camp. 258

3 *Abel v Sutton* (1800), 3 Esp 108. See, also, *Odell v Cormack* (1887), 19 Q B D 223. *Op Smith v Winter* (1838), 4 M & W 454

4 *Kilgour v Finlayson* (1789), 1 H Bl 156

5 *Helyear v. Hawke*, (1803), 5 Esp 72,

6 (1866), L R 1 Q B 352

7 *Sykes v. Giles* (1819), 5 M. & W 645, *Barker v. Greenwood* (1836) 2 Y & C of 414, *Coupe v. Collyer*, (1890), 62 L T 927.

8 *Bridges v. Garrett* (1870) L. R 5 C. P 451. Such a custom must be proved.

9. *Hine v. S. S. Ins Syndicate* (1895), 72 L T 79, C A.

10 *Smith v Johnson*, 71 Mo. 382. A fortiori he cannot sell it to himself. Appeal of *Yard*, 12 All 359 (Amer). In *Feiner v. Puetz*, 77 Mo App 405 this presumption was rebutted by evidence that the agent had authority to sell or do with it as he pleased, provided he did subject his principal to liability as an indorser. See also *Ames v. Dreier*, 31 N H 475.

instrument, cheques, certificates of deposits etc., in lieu of money, or to set off a claim due from himself or to take property for his own use. Where he is authorised to receive a cheque or note he has no implied authority to endorse and collect it.¹

Where the debt is payable in goods, an agent authorised merely to receive the goods has no implied authority to receive money or other goods or in different quality or quantity.² All these restrictions, however, apply only to the special agent to collect and receive payment and do not extend to agents who have got general authority to manage a business to which such collections and receipt of payment are only incidental.³ Where the authority of an agent is apparently wider than an authority merely to collect and receive payment, a person dealing in good faith, on the basis of such apparent authority, is not affected by these restrictions.⁴

Payment to an authorised agent discharges the debtor of his liability to his creditor even though the money paid has not reached his hand. In an action by the creditor, he can successfully plead discharge by such payment, but if he failed to do so, he cannot subsequently recover the amount so paid from the agent, even though he has mis-appropriated it.⁵ Where, however, such payment is made under mistake of fact the agent is liable to a refund, unless he has in the meantime paid it to the principal or has done something equivalent to such payment, in which case recourse must be had against the principal only.⁶ The agent is also liable when he has secured such payment by duress, or fraud or other wrongful act.⁷ We shall revert to this subject subsequently under the head "liabilities of the agent to third person."

Rights & liabilities of debtor on such payment

An authority to make payment may arise from a general authority to manage the business of the principal to which such payment appertains or it may be specifically conferred. Like other authorities relating to personal property it does not require to be conferred in writing or in any particular form. An oral instruction is sufficient. It may also be implied like other authorities from the circumstances of a particular case, from the conduct of the parties, or from other authorities as an incidental authority.⁸ Thus, a cashier of a bank has general authority to pay any moneys of the bank on orders believed to be genuine. Such a payment of the contents of a deposit account on a forged order which he believed to be genuine was

Authority to make payment

1. See Katlar, pp. 241, 242, and the authorities cited therein.
2. *Cushman v. Somers*, 62 Vt. 132.
3. *Liversey v. Collin Campbell*, 1 A. L. J. R. 124; *Nichols & Shepart Co. v. Hackney*, 78 Minn. 461.
4. See Mechem, S. 948 and the cases cited therein.
5. *Kulandavelu Pillai v. Ramaswami Naicker*, A. I. R. 1923, Mad. 551, following *Ellis v. Goulton*, (1893) 1 Q. B. 350; *Bamford v. Shuttleworth*, 11 A. & E. 926; *Stephens v. Badcock*, 3 B. & A. 354.
6. *Pollard v. Bank of England*, (1871), 6 Q. B. 623; *Taylor v. Metropolitan Railway*, (1906) 2 K. B. 55.
7. See Bowstead, Art 127, p. 307.
8. See Katlar, p. 243.

held well within his authority.¹ In *Read v. Anderson*¹ it was held that the employment of an agent to make a bet in his own name on behalf of his principal implied authority to pay the bet if lost and on the making of the bet such authority became irrevocable. But where an agent authorised to pay part of the debt in discharge of the whole, finding the creditor not agreeing to it paid it in discharge of the part only; it was held that such payment was unauthorised and did not save limitation.³ Where, however, an agent authorised to pay principal and interest both, paid interest only, it was held to have been within his authority and thus to save limitation.⁴

In *Lucas v. Wilkinson*,⁵ a person at the request of his solicitor, who was also the solicitor of another person lent money to the latter on the basis of a bond. The solicitor who used to collect rent for the latter and make payments on his account, and who was indebted at the time to him, at demand of the former for the payment of the bond, deposited the bond with a bank and with the money thus obtained paid off the debt without information to the latter. On a suit by the bank on the basis of the bond against the debtor on the death of the solicitor who died insolvent held that the payment by the solicitor being unauthorised the bond was undischarged.

Ordinarily an agent is not authorised to pay a debt due from his principal without previous authority or subsequent assent. But where a person fills the character of agent to the parties, and receives from one a sum on account of the other, which sum he carries to the account, he may make any deductions afterwards from that sum which the person who paid it would have had a right to make in the form of set-off.⁶

In *Horler v. Carpenter*,⁷ an agent, who was authorised to receive payment of the rent due to his principal, was instructed by the principal to pay £20 to his creditor in four instalments, i. e. £5 each quarter out of the rents received by him and any other sum in which the principal may be found indebted to the creditor afterwards. It was held that the instructions authorised the agent to pay not only £20 then due but also any further advances made by the creditor,

Foreign merchants receiving consignments for sale with drafts drawn against the shipments have implied authority to pay the proceeds of the sale of such consignments to their own account with their banker and credit their principals in the current account with such proceeds. They are not bound to apply to the proceeds specifically to meet the drafts of their principal.⁸

1. See *R v. France*, 12 L. T. 364.

2. 13 Q.-B. D. 779, see also *Soymour v Bridge*, 14 Q. B. D. 460; *Thomas v. Hawkins*, 5 T. L. R. 551.

3. *Linsell v Binsor*, 2 Bing. N. C. 241.

4. *Hall v Thornton*, 19 L. T. O. S. 184.

5. 1 H. & N. 120. See also *Wemys v Greenwood Cor & Hammersley*, 5 L. J. O. S. B. 257; *Newbould v Smith*, 33 Ch. D. 127.

6. *Wemys v. Greenwood Cor & Hammersley*, supra.

7. 3 C. B. N. S. 172.

8. *Spartali v. Credit Lyonnais*, 2 T. L. R. 178; *Jafferbhoy v Charlesmouth*, 17 Bom. 520.

Where there are funds in the hands of the agent belonging to his principal and when the latter orders him to deliver them to his creditor in extinguishment of his obligation and the order is communicated to the creditor as well, then there arises on the part of the agent an obligation on which apparently he can be sued both in law and equity—in law as on a contract and in equity as upon an implied assignment of such funds as there may be in his hands to satisfy *pro-tanto* the claim of the creditor.¹

Authority to borrow and pledge must be conferred in express terms, or be necessarily and inevitably inferred from the very nature of the agency actually created and requires strict proof. So strict is the rule that it will not be presumed even from an appointment of one as general agent, unless the character of the business, or the duties of the agent are of such a nature, that he was bound to borrow in order to carry out his instructions and the duties of the office.² If the transaction of business absolutely required the exercise of the power to borrow money in order to carry it on, then that power was impliedly conferred as an incident to the employment, but it does not afford a sufficient ground for the inference of such a power, to say the act proposed was convenient or advantageous or more effectual in the transaction of the business provided for, but it must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the original employment.³

(1) Authority to borrow and pledge.

There is a strong inherent improbability that a principal intends to give his attorney power to borrow money if he does not expressly state it.⁴ It does not, however, mean that it is impossible that the power to borrow may be implied. It may be that the conduct of the principal or the course of dealings of the parties may reasonably justify it.⁵ It is implied where it is practically impossible that the purpose contemplated should be accomplished without its exercise.⁶ As in other cases of powers arising by emergency, so in this case as well, the possibility of communicating with the principal and receiving his directions, would usually have to be excluded before the authority would arise.⁷

But where the authority is based upon necessity, the fact that the necessity arose from the wrongful act of the agent himself, would not necessarily defeat a claim by the lender to its recovery where he was ignorant of this fact when he advanced the loan.⁸ Where a power of attorney authorised the

1. *Ananthachari v. Rathnam T. Saratha A.* 1 R 1923 Mad 713, following *Walker v. Rostron*, 9 M. & W. 411, and *Crauford v. Gurney*, 9 Bing 372.

2. *Exchange Bank v. Throuer*, 118 Ga 433, *Fergusson v. Uma Chand Bond*, 1 L.R. 33 Cal 343.

3. See *Katral*, p 256, citing *Hickford v. Menier*, 107 N. Y. 490 etc.

4. *Jacobs v. Morris*, (1901) 1 Ch. 261 affirmed in (1902) 1 Ch. 816.

5. See *Bryant v. Banque du Peuple*, (1893) App. Cas 170; *Robinson v. Brewery Co.*, (1896) 2 Ch 841; *Howe v. Finnegan*, 61 App. Div. 610; *Brucklesby v. Building Society*, 1895. App. Cas. 173.

6. *Mechem*, § 1026. See *Haetayne v. Bourne*, 7 M. & W. 595.

7. *Mechem*, § 1026.

8. *Atlantic Mills v. Indian Orchard Mills*, 142 Mass 268.

agent "to make, sign, seal, execute and deliver any agreements, contracts, conveyances, assignments, leases or counterparts of leases, bills of sale, bonds, mortgages, re-conveyances etc., and generally to act in the management and superintendence of the affairs of the principal and in any of the aforesaid capacities, without any reservation whatsoever, and to do, perform and execute all acts and things as fully and effectually as the principal might or could do if personally present and did the same notwithstanding no special power or authority is contained in these presents" it was held that the agent had by implication an authority to borrow.¹ It has been held that although a general agent may not have power to borrow money for his principal, yet the authority to borrow in a particular case may be shown by a previous authority, either express or implied, or by subsequent ratification.²

Where an agent is entrusted by the principal with the securities in such a way as to lead the lender to the belief that he has authority to borrow on those securities, and the lender acting on such belief makes an advance, the principal is bound by such loan even though the agent was not, in fact, authorised to borrow, or, he acted against, or in excess of the principal's instructions.³

But a blank acceptance is not itself evidence of authority to the party to whom it is given to borrow the amount on the credit and in behalf of the acceptor, even although it is admitted on the part of the acceptor that the money to be raised on the security of the bill was to be lent to the acceptor and however the latter may be liable on the bill at the suit of an honest holder, the question on a claim for money lent by him to the acceptor will be, whether the money was received by any one as authorised agent of the acceptor in that behalf.⁴

Implied
authorities
in the
authority to
borrow

A general authority to borrow includes by implication authority to give the lender, in the name of the principal, the appropriate and ordinary securities.⁵ The rule, however, is subject to certain necessary exceptions and where pledges or mortgages of property are involved which require an instrument under seal such authority is not implied in the authority to borrow, where the latter is not conferred by a power of attorney in writing and under seal or registered. But powers of attorney to borrow money upon the security of land are usually under seal and include the power to mortgage in express terms. In such case even where an authority to mortgage is not given in express terms it is usually implied.⁶

An agent authorised to borrow is usually bound by such limitations as to amount, time, security, rate of interest, and the like and often as to the person with whom he should deal.

1 *Durga Devi v Finlayson & Co.*, 1882, A. W. N. 39.

2 *Bumaree Lal v. Mahabeer Singh*, 2 Hay 644.

3 *Bricklesby v. Temperance Building Society*, 72 L. T. 477; *Robinson v. Montgomery Shire Brewery Co.* 65 L. J. Ch. 915; *Fry & Mason v. Smellie & Taylor*, 81 J. L. K. B. 1003; *Hooper v. Herts.*, (1906) 1 Ch. 549.

4 *King v. Forbes*, 3 F. & F. 41.

5 *Hatch v. Caddington*, 95 U. S. 48; *Belknap v. Davis*, 19 Me. 455.

6 *Meechem*, 8. 1028.

When his authority is so limited and the limitations are not secret instructions but known to the lender the principal is not bound if the agent acts against or in excess of such limitations.¹ Where, however, an agent has a general authority to borrow or though the authority is not general, he is not limited in these respects or the limitations are not such as the lender is bound to know, he would apparently be authorised to select the lender, determine the amount, and agree upon other terms² subject only to the limitations of what is apparently fair and reasonable.³

When an agent borrows money having no authority whatever to borrow, or where having some authority, he borrows in excess or in disregard of limitations or conditions with knowledge of which the lender is charged, the principal cannot be held liable for the contract⁴ unless with full knowledge of the facts he ratifies the act⁵ and the mere receipt of the benefit of such loan by the principal does not constitute such ratification.⁶ Where, however, the principal after discovery that the money, the benefit of which has been received by him, has been borrowed on his account, voluntarily retains the money so borrowed or the benefit that arose out of such borrowing, this fact will ordinarily be evidence of ratification, although the principal might have, at the time of the receipt of the money or benefit, no knowledge of this fact.⁷ Where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority, though it turns out that his act has not been authorised or ratified or adopted by the principal, then although the principal cannot be sued at law, yet in equity to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.⁸

Liability of principal for money borrowed without authority.

Like land, authority to sell in the case of personal property or goods means an authority to make a contract of sale binding on the principal.⁹ In this case also it must be distinguished from mere authority to find out purchasers or to solicit orders which the principal may accept or reject at his pleasure.

(g) Authority to sell goods or other personal property.

Authority to sell goods or other personal property need not be conferred in any particular manner. It may be oral or written and may be conferred either expressly or may arise by

1. *Walsh v. Hunt*, 120 Cal. 46 (Amer.); *Bryce v. Massey*, 35 S. Car. 127.
2. *Bank of Batavia v. New York, etc., R. Co.*, 106 N. Y. 195.
3. See *Mechem*, § 1027; *Katlar*, p. 259.
4. *Spooner v. Thompson*, 48 Vt. 259.
5. *Ghasiram v. Raja Mohun Bikram Shu*, 6 Cal. L. J. 639.
6. See *Clark v. Chark*, 50 Mo. App. 532; *Humphrey v. Havens*, 12 Minn. 298; *Bryant v. Moore*, 26 Me. 84; *Baldwin v. Burroves*, 47 N. Y. 199; *Cooley v. Perrine*, 41 N. J. L. 322; *Forman v. Liddesdale*, 1900 App. Cas. 196.
7. *Fitch Commerce v. Steam Mill Co.*, 89 Me. 34; *Bank of Lakin v. National Bank of Commerce*, 57 Kan. 183.
8. *Per Romer*, L. J. in *Bannatyne, v. Maciver* (1600) 1 K. B. 103; *Reversion Fund & Ins. Co., v. Maison Conway*, (1913) 1 K. B. 364.
9. See *Mechem*, § 861 and notes on page 185.

implication from the circumstances of a particular case.¹ Where the authority results from construction, or is deduced from circumstances, the circumstances must be such as fairly to warrant the inference of an authority to sell.² Thus, where a power of attorney merely authorised the agent "to collect all debts, compound the same, and do whatever was necessary about the premises as well as to sign my name in all business transactions," it was held that it was not sufficient to imply a power to sell the goods³ while a power of attorney authorising the agent "to attend to any and all descriptions of business in which I may be interested or concerned in a real or personal manner, and to receive for me any sum or sums of money which may be due to me and give receipt therefor" was held sufficient to imply such authority.⁴

It has been held that mere possession of goods by the agent does not warrant the implication of an authority to sell, even though the agent might be a dealer in the property of the kind, unless the principal has done something further to clothe the agent with permanent authority to sell or has conferred upon him or permitted him to assume the apparent indicia of ownership.⁵ But possession as apparent owner must be distinguished from possession as apparent agent⁶ inasmuch as there are many things which might be done by an apparent owner but which are not allowed to be done by an apparent agent. For instance, an apparent owner can sell property in lieu of his own debts, while an apparent agent cannot.

An apparent authority to sell cannot be inferred in every case from similar previous dealings,⁷ but where the conduct of the principal enables the agent to hold out to the purchasers that he has such authority, the contract of sale becomes binding on him even though he did not confer any such authority and even where his instructions to the agent were to the contrary.⁸ For instance, where a horse was left with a servant to exhibit it with a view to sell, though he had none in fact, it was held that a sale by the servant under such circumstances was valid and binding upon the master.⁹ Similarly, where a purchaser of hemp lying in London wharfs had at the time of purchase allowed it to be entered in the wharfinger's books in the name of the broker through whom he had purchased it and whose ordinary business was to buy and sell hemp, it was held that the broker had implied authority to sell it and his sale and receipt of money bound the principal.¹⁰

Where an owner of property gives all his indicia of title to another person with an intention that he should deal with the

1. See Mechem, S. 848.

2. See Katlar, p. 216 and the authorities cited therein.

3. *Camden Fire Ins. Assn. v. Jones*, 53 N. L. J. 189.

4. *Blaisdale v. Bohr*, 77 Ga. 381.

5. See Katlar, pp. 216, 217, and the authorities cited therein.

6. See *Sloan v. Brown*, 130 Am. St. Rep. 1019.

7. *Moody v. London, Brighton & South Coast Ry. Co.*, B. & S. 290, But see also *Kemble v. Atkins*, 7 Taunt. 260.

8. *Dyer v. Pearson*, 3 B. & C. 58.

9. *Steicart v. Beaumont*, 4 F. & F. 1034.

10. *Pickering v. Busk*, 15 East. 38.

property, the principles of agency apply and any limits which he has imposed on such person dealing with the property do not affect the right of an innocent purchaser from such person without notice of such limits.¹ Any such limits, however, whether they relate to the subject matter of sale, or time, or terms or other elements affecting the transaction which the principal may choose to qualify are binding on the agent and even upon purchasers who have notice or who can be charged with notice thereof.² So where the authority is to sell "upon terms to be agreed upon" or "subject to confirmation" and the like, the agent cannot make a valid contract otherwise³ unless the qualification has been waived by the principal, or has been concealed from the person who dealt with the agent.⁴

Where the authority specifies the subject-matter of sale, the amount or quantity thereof, the time for sale, the mode of sale, the price or rate at which it is to be sold, the terms or conditions on which it is to be sold, the agent has no implied power to deviate from it. Where the amount or quantity is specified he has no authority to sell.⁵ Whether he may sell less or a part of it will depend upon a variety of circumstances. Where the situation is such that the sale of less or part may be prejudicially affecting the principal, the only reasonable inference possible under the circumstances may be that the principal meant to sell the entirety. For instance, if an agent is authorised to sell a team, the sale of horses separately or of one only may presumably cause a loss to the principal. In such a case it is, therefore, difficult to infer that the principal meant the sale of the horses separately or to sell one only without selling the other.⁶ So an agent authorised to sell a horse was held not justified in selling half of it.⁷ But there may be circumstances which may make the sale piecemeal or of part only advantageous to the principal or such sale only may be possible and proper, as where it fetches more price or without lowering the price the subject-matter can be disposed of more quickly and so on and so forth, the agent in such case is justified in inferring that he has implied authority to sell piecemeal or a part only. For instance, an agent who is authorised to sell shares of stock might sell in parcels, or might sell a part to one person and the rest to another and each sale will be valid and binding as within the authority in the absence of special directions to the contrary.⁸ So in the case of a big plot of land to be sold for residential houses.

What does authority to sell goods on other personal property imply?

1 See *Rimmer v. Webster*, (1902) 5 Ch 163; *Henderson & Co. v. Wallbank* (1895) 1 Q B 521; *Richardson v. Cartwright*, 1 C. & K 328; *Waller v. Driford* E. & B. 740, and notes under 'what acts of agents bind their principals.'

2 See *Mechem*, § 849 citing *Smith & Co., v. Collins*, 61 C. C. A. 182.

3. *Johnson R Signal Co., v. Union Switch & Signal Co.*, 51 Fed. 85; See *Katlar* p. 218 and the authorities cited therein.

4. See *Mechem*, § 849, *Cuthou v. Lusk*, 97 Ala. 674.

5. See *Katlar*, pp. 218 and 219, and the authorities cited therein. See also *Mechem*, §§ 853, 854, and 858.

6. See *Mechem*, § 850; *Henry v. Buckner*, 13 Colo. 18 (Amer.)

7. See *Ulster County Sav. Inst. v. Fourth Nat. Bank*, 54, Hun. 686.

8. See *Ulster County Sav. Inst. v. Fourth Nat. Bank*, 54, Hun. 638.

Similarly, an authority to sell on a particular day specified confers no power to sell it on a subsequent or different day.¹ There is no presumption that an authority to sell goods in a single instance continues for several years afterwards.²

An agent authorised to sell goods is presumably empowered to sell them in the usual way, and, therefore, cannot without special authority, sell them by auction and a purchaser with notice at such a sale would, ordinarily, acquire no title.³ For the same reason an agent authorised to sell goods at auction cannot sell by a private sale,⁴ and the purchaser with notice acquires no title even though full price fixed for the auction sale is realised.⁵

When the price is fixed or the terms or conditions of the sale are specified by the principal the agent must abide by such specification.⁶ But an agent clothed with general power to sell without restrictions has implied authority to select the purchaser,⁷ to fix the price and to agree upon such ordinary incidental matters as the time and place of delivery and the other ordinary and usual terms of sale.⁸ The price so fixed, however, should not be less than the market price, if there is any, and where there is no market price it should not be less than the reasonable price.⁹

It has been held that it is generally within the apparent scope of agency to sell goods to stipulate that if the goods are not satisfactory to the purchasers, or if the machinery sold does not work satisfactorily, the purchaser may refuse to take delivery or may even return such goods or machinery.¹⁰ In some cases even a stipulation that if the thing purchased may not be found marketable within a reasonable time prescribed by the contract of sale it may be returned, has been held to be within the apparent scope of the authority to select agent.¹¹ Accordingly it has been held that an agent selling a furnace to be shipped in detached parts has implied authority to undertake to put them together in the working order in the building where it is to be kept.¹² Where it is customary with the principal to insure the goods at the request of the purchaser, an undertaking by his travelling agent who registers orders on his behalf and transmits them to him, that he will transmit instructions to the principal to get the goods insured, is well within his authority.¹³ He has, however, no power

1. *Bliss v Clark*, 16 Gray (Mass) 60

2. *Read v Baggott*, 5 Ill. App. 257.

3. *Toule v. Leavitt*, 23 N. H. 360

4. *The G. H. Montague*, 4 Blatch (USCC) 164 Fed. Cas. No. 5, 377 *Daniels v Adams*, 1764 Ambl. 495; *Marsh v. Jelf*, 3 F. & F. 234.

5. *Daniel v Adams*, 1 Ambl. 495; *Jagues v Todd*, 3 Wond. 83, Mechem, 853.

6. See *Wolfe v. Luyster*, 1 Hall (N. Y.) 146; *Steele v. Ellmaker*, 11 S. & R. 86

7. *Peay v. Seigler*, 48 S. Car. 490

8. See Katiar, p. 220 and the authorities cited therein

9. *Bigelow v. Walker*, 24 Vt. 149.

10. *Oster v. Mickle*, 35 Minn. 245; *Eastern Mfg. Co. v. Bientk*, 32 Tex. Civ. App. 97.

11. *Babcock v. Deford*, 14 Kan. 408.

12. *Co. v. Clark*, 42 Minn. 335;

13. *McDonald v. Pearce*, 5 Ga. App. 130; *Worsley v. Ayres*, 144 Iowa, 676.

to make such undertaking that the purchaser can return all the goods, which he cannot sell within a particular season, or that the buyer may counter-amend the order at his pleasure, or that the principal should receive and allow for these imperfect goods previously purchased by the buyer from other parties or which he may subsequently purchase from the principal himself, or that the buyer can pay for the goods on resale and the agent will find buyers for him, or that the principal will pay for the fitting up of the place where the goods will be resold.¹

Where the agent fails to observe the terms or conditions on which he is to sell, he becomes liable to the principal for any loss caused to him by such failure,² but as against the *bona fide* purchaser without notice of such terms and conditions, the contract of sale is binding on the principal.³ A purchaser, however who has knowledge, or who can be charged with a knowledge of such terms and conditions, cannot take undue benefit of the mistake or negligence of the agent in failing to impose such terms and conditions and the contract of sale should be avoided by the principal in such case.⁴

An authority to sell goods or personal property also implies power to make, execute, and deliver any necessary and usual bill of sale or any necessary and usual notice or memorandum in writing which may be required to give effect to the sale or to any other provision of law and the like.⁵ A warranty of title or against incumbrances upon title to the goods are usual in cases of sale of goods or personal property, inasmuch as the person selling the goods as his own must warrant the truth of his allegation on which he induced the vendee to buy. Hence an authority to sell goods or other personal property generally implies an authority to give a warranty of title to such goods or property⁶ and of the effect that they are free from any charge or incumbrances.⁷ Authority to make such representations as are generally required to push up the sale of an article is generally implied in the authority to sell.⁸ In soliciting the sale of an article the questions would naturally come up concerning the quality and usefulness of the article. The agent is attempting to sell, and therefore, statements made by him concerning the quality of the article and the purpose for which it is intended must be within the apparent authority.⁹

1 See Katjar, p 221 and the authorities cited therein.

2 See *mechem*, S. 860.

3 *Ibid.* See also *Authors, etc. Association v. O'connor* 147 Fed. 617

4 *Mechem*, S. 860.

5 See *Potter v. Springfield Milling Co.*, 75 Miss. 632.

6 See S. 14, Indian Sale of Goods Act, 1930 : *Authors' Commentary* on the 'Indian Sale of Goods Act,' pages 205 to 208 and the authorities cited therein. See also *Mechem* on Sale of Goods, S. 1300 ; *Turner v. Moon*, (1901) 2 Ch. 825 ; *Syud Sayef Ali v. Syud Mahmood*, 7 W. R. 196 ; *Rajah Nilmone Singa v. Gordon*, 9 W. R. 371.

7 *Ramdeo v. Cassim*, 21 Cal. 173 ; *Hughes Hallett v. Indian Mammoth Gold Mines*, 22 Ch. D. 561. See *Remfry* on Sale of Goods, S. 597.

8 *Haynor Mfg. Co. v. Davis*, 147 N. C. 267 ; *Doylestown Agr. Co. v. Brackett*, 84 Atl. 146.

9 *Ibid.* See *Mechem*, S. 890.

Except in the cases where the goods to be sold are such as are usually sold only by some sort of public advertising, or where authority is so general as to vest in the agent full management of the business an agent employed merely to sell goods generally has no implied authority to advertise,¹ and it is generally the matter, which the principal, if he chooses to do so, will arrange for himself.²

An authority to sell goods is presumably an authority to sell for cash price and does not imply a sale on credit,³ unless such sale is warranted by some valid usage to that effect.⁴ A general authority to prescribe terms or establish a course of dealing may, however, justify a different conclusion.⁵

It has also been held that an authority to sell does not imply an authority to exchange or barter.⁶ So an agent authorised to sell goods has no implied authority to receive pronotes, cheques or other negotiable papers unless it is a currency of the country and having received payment in one kind of currency he has no implied authority to exchange.⁸ If he does so, he does so at his own risk and if he receives a counterfeit coin, or a false bill, he will himself bear the loss. Where he is authorised to receive notes in payment of the price he cannot accept goods in payment of the notes.⁹

So also an authority to sell does not generally imply an authority to pledge or mortgage the goods. A pledge or mortgage, therefore, of the goods entrusted for sale, by the agent, either on his own account, or on account of the principal even is altogether without authority.¹⁰

It has been held that an agent employed merely to sell goods and not invested with the wider authority of a manager of a business or of a general sale agent has ordinarily no authority to bind the principal by a promise to pay commission to third persons for sales made by them for the principal,¹¹ nor can he deliver the goods to third persons for sale, the price to be paid when they are sold by them, and bind the principal by a promise to pay commission upon such payment.¹²

It is not within the apparent authority of a sale-agent to grant monopoly to the purchaser and to undertake not to sell a particular kind of goods to any other person, or for a less price

1 See Katjar, p 223 and the authorities cited therein

2 See Mechem, § 93

3 See Katjar, p 223, and the authorities cited therein

4 See *Palham v Hilder*, 57 R. R. 208. It has been held that in the case of a factor or broker an usage to sell on reasonable credit has been recognised so generally that it has now obtained the force of law generally authorising them to sell on reasonable credit in the absence of a custom to the contrary. See Katjar, p. 223.

5 See Mechem, § 893.

6 See Katjar, p. 224 and the authorities cited therein,

7. See *Buckwalter v Craig*, 55 Mo 71; *Hull v Storrs*, 7 Wis 253

8 *Kent v. Forstein* 12 Allen (Mass) 342

9 *J. A. Jay Co v. Causey*, 131 N. C. 350

10 See Katjar, p 224 and the authorities cited therein

11 *Atlee v Fink*, 75 Mo. 100. See however *Cooper v Coad*, 91 Neb. 840, where an agent sent into a locality in which he was a stranger to sell valuable horses was held empowered to engage the assistance of a local dealer

12. *Frank v. Inglis*, 41 Ohio St 560

except in a very rare case where such course is specially advantageous to the principal.¹

It has also been held that a mere authority to sell goods generally, comes to an end as soon as the goods are sold or a binding contract of sale is affected² and the agent, therefore, has generally no implied authority to waive performance of the terms of the contract³ or to alter or to rescind⁴ the contract. But where the agent is entrusted with the general management of a business he has implied authority to do all which the principal would do under the circumstances and he can therefore waive the performance of the terms of the contract if necessary and alter or rescind it as he thinks best.⁵

It is to be remembered that an authority to sell goods or other personal property does not imply an authority to buy as well, or to compromise or release the principal's rights, or to pay his debts. An agent authorised to sell property cannot appropriate it to his own use, or to pay off his own debts.⁶ So a purchaser from an agent cannot set off a debt due from such agent against the price of the goods purchased⁷ except where the agent is permitted by the principal to appear as the ostensible owner of the goods sold.⁸ For the same reason, an agent authorised to sell goods or any other personal property cannot sell such goods or property to himself either directly or indirectly without the permission of the principal, nor can he acquire, without such permission, in any way, any right or interest in the subject-matter of sale. If he attempts to do so, the principal may treat such transaction as voidable.⁹

It is also to be observed that a mere authority to sell does not generally imply an authority to receive notice, unless such notice concerns the transaction of sale covered by the authority and the agent is in sole charge of the business of the principal in the locality where the transaction is made, and is the only person representing the principal easy of approach to the person who gives the notice.¹⁰ So a notice to a sales-man in a store that his principal's insurance will not be renewed is not sufficient;¹¹ while a notice to a travelling sales-man of the dissolution of a firm, which was one of his customers, and from whom an order had been received directly and was not yet filled, has been held to be sufficient for the reason that the agent was the sole representative of the principal in the territory where the firm was working and looked up references of new customers and had on previous occasions reported dissolutions

1. See *Katlar*, p. 225.
2. *Stillell v. Mut. L. Ins. Co.* 72 N. Y. 385; *Robinson v. Nipp*, 20 Ind. App. 156 (Amer.)
3. See *Mochem*, 8. 908.
4. See *Katlar*, p. 225 and the authorities cited therein.
5. *Ibid*, pp 225, 226.
6. *Ibid*, p. 226.
7. *Stewart v. Cowles*, 67 Min. 184; *Grubel v. Busche*, 75 Kan. 20.
8. *Rahone v. Williams*, 7 T. R. 360; *Fish v. Kempton*, 7 C.B. 687; *Capel v. Thornton*, 3 C. & P. 352; *Pickering v. Bush*, 15 East. 38.
9. *McKenzie v. State*, 8 Ga. App. 124; *Merrill v. Sar*, 141 Iowa 368.
10. *Jenkins v. Renfrow*, 151 N. C. 323; *Collins & Toole v. Crews*, 59 S. E. 127.
11. *German Ins. Co. v. Goodfriend*, 97 S. W. 1098.

of partnerships.¹ So also where goods were sold with a warranty under a stipulation that if no complaint is made within a certain time the warranty shall be deemed as satisfied, but where it was not clear to whom the complaint should be made, it was held that a complaint to a local agent of the principal who had assisted in the making of the sale and was authorised to collect the price was sufficient.²

An agent authorised merely to sell or to solicit orders without possession of the goods to be sold, unless he is specially authorised to do so, or unless there is some established usage to this effect, or a previous course of dealings estops the principal from denying such authority in the agent.³ But where the principal entrusts the agent with the possession of the goods to be sold and authorises him to sell and deliver them, such agent has implied authority to receive payment of so much of the price as stipulated to be paid at the time of delivery and a payment made to such agent at the time of sale and delivery or as part of the same transaction is binding on the principal. Where, however, the price is to be paid by instalments the agent delivering possession can receive only that instalment which is to be paid at the time of the delivery and not any other instalment which falls due subsequently. These restrictions, however, do not apply to an agent whom the principal puts in charge of a general sale agency authorising him to sell the goods, fix the terms and conditions of sale, and to receive the proceeds thereof.⁴ A bonafide payment to a person whom the principal allows to hold out as ostensible owner of the goods is also binding on the principal.⁵

(h) Authority
to manage
business or
landed
property.

To manage means to direct, to control, to conduct, to carry on.⁶ The extent of the implied or incidental authority of an agent, who has a general authority 'to manage his principal's business or property depends largely upon the nature of such business or property and the degree to which it is placed under the agent's control.⁷ It is generally presumed to be co-extensive with the business to be performed, and includes the authority to do all those things which are necessary and proper to be done in carrying out the business in its usual and accustomed way, and which the principal could and would usually do in like cases if present.⁸ Its exercise, however, should be confined to the scope of the business and it should be filled up by the agent only for the principal's benefit and not for the benefit or accommodation of third persons, even though indirectly such exercises may benefit the principal,⁹ nor on his own account or for his own benefit.¹⁰

1. *Jenkins v. Renfro*, 151 N. C. 323.

2. *Burkey Saw Co v. Rutherford*, 64 S. E. 444.

3. See Katlar, pp. 228, 229, and the authorities cited therein.

4. *Ibid*; p. 229.

5. See Katlar, p. 229.

6. Mechem, § 979.

7. Mechem, §. 980.

8. See Katlar, p. 246, and the authorities cited therein.

9. *Bullard v. De Groff*, 59 Neb. 783.

10. *Clarke v. Kelsey*, 41 Neb. 766; *Mc Clenden v. Bradford*, 42 La. Ann. 160.

Authority to manage does not imply any general authority to waive, surrender, or qualify his principal's rights, privileges, liens, immunities or protective conditions. Management generally involves control, preservation, due ordering, and not waiver, surrender or destruction. This is true not only of the rights and privileges relating to the subject-matter outside the ordinary scope of his management but also of those within it and an agent authorised to manage and thereby acquire certain rights and benefits has no implied authority, after such requisition, to give them up or relinquish.¹

There may, however, be cases where waiver or surrender of certain rights and privileges may be necessary or incidental to the proper management entrusted to him and without which the very object of agency would be incapable of accomplishment. It is only natural that in such cases law implies an authority to waive or relinquish the rights and privileges which the necessity of cases requires to be so relinquished. For instance, the general manager of a timber yard, authorised to sell timber with or without security, for cash or on long or short credit, and having general management or conduct of the business, has been held to have implied authority to waive a mechanic's lien, provided for by statute, for timber sold by him especially where he did it in order to secure payment by other means. A president of a manufacturing corporation, who has authority to make contracts, has implied authority to terminate or release contracts made.²

It has been held that where an agent is employed generally to manage his principal's store or business, he has usually implied authority for the keeping of the stock, to make reasonable and proper purchase of goods upon his principal's account on such terms as to credit and time of payment, as are customary in the purchase of such goods in like cases;³ but he has no authority to purchase goods of a kind or amount not usually kept or bought for such business or store.⁴ The authority of such agent may also be limited by the terms of the grant to the sale of only such goods as are supplied by the principal, in which case, he has no authority to make any purchase.⁵

Similarly, an agent authorised to take charge and manage his principal's hotel, has implied authority to buy goods suitable and appropriate to the use in the hotel upon his principal's credit;⁶ but not to bind his principal for the safe keeping and return of carriages furnished by a livery stable keeper for use of guests of the hotel.⁷

An agent, employed to manage plantation of farm, has implied authority to purchase on his principal's account the

2. Mechem, §. 990.

1. See Katiar, pp. 250 and 251, and the authorities cited therein.

3. See Katiar, p. 246 and the American authorities cited therein.

4. *Hackett v. Van Frank*, 105 Mo. App. 384.

5. *Watteau v. Fenwick*, (1893) 1 Q. B. 346.

6. *Brecher v. Venn*, 53 Mich. 466. Advertising is considered within the ordinary duties of the manager of a hotel. So he can bind the principal by a contract for advertising. See *Mullin v. Sirr*, 34 N. Y. Misc. 540.
Brockway v. Mullin, 46 N. J. L. 448.

necessary supplies of plants, seeds, manure, tools, etc., which are used in such plantation or farming,¹ but he cannot pledge his principal's credit for supplies made to the 'hands' engaged upon such plantation.² But where it is customary in the business for the employer to board the workmen employed, such an agent may lawfully contract in his principal's name, for the board of the men employed by him;³ but the authority is limited to necessary provisions⁴ and only to the business where such custom exists.⁵

Gomashta

A *Gomashta* has a general authority to manage his employer's business, not as a mere agent, but with power to do all acts necessary for carrying it on, and to authorise brokers to make contracts;⁶ but a special power is required to empower the mercantile agents to draw or endorse bills or notes which may be conferred expressly or may be implied from the circumstances of a particular case.⁷ Where, however, a person who was formerly a *Gomashta* drew a *Hoondi* with the words and heads of the instrument '*Siri Nishanee Doongresee Dass Gangajal* etc,' it was held that these words alone were not sufficient by usage to indicate that he was authorised to act for the firm of *Doongresee Dass Gangajal* to bind them by that *Hoondi*.⁸

General manager

A general manager put in complete charge of a business in which servants and the like are ordinarily employed, has an implied authority, within the range of what is reasonable and proper, to employ the necessary help and for that purpose to make contracts of a usual and reasonable nature, as for example, the hiring of an employer for a year or for a season or the assumption of the risk of the employee's competency to fill the position; but he cannot make contracts of an unusual or extraordinary nature as, for example, to give an employee as part of his compensation, an interest in the principal's business or in its profits.⁹

Husband and wife

Where a husband is given by his wife the general management of her business, property or estate, or resumes such management with her knowledge and acquiescence, contracts which he makes for labour or supplies needed therefor in the ordinary course of events, or for improvements, buildings, and the like added with her knowledge of apparent approval, will be binding upon her but as already pointed out, the husband has no authority simply by virtue of his relationship as husband. Even as agent of his wife he cannot charge her for goods and supplies which it is his duty as head of the family to furnish on his own account, nor his authority as such extends to the supplies and labour for his own business or estate. The law is

1 *Jeffords v Alford*, 151 Mass. 94, *Mejer v Baldern*, 52 Miss. 263

2 *Carte v Burnham*, 81 Ark. 212

3 *Burley v. Kitchell*, 20 N. J. L. 305. See also *Cannon v Henry*, 78 Wis. 167.

4 *Heald v Hendy* 89 Cal. 632

5 *St. Louis etc Ry Co v. Bennett*, 53 Ark. 208

6 *Jardine Skinner & Co v. Nathooram, Bourke*, A. O. C. 43

7 *Pestonjee Nusserwanjee v Gool Mohd Sahib*, 7 Mad. H. C. 369

8 *Shadi Ram v. Arja Raj*, 13 P. R. 1871

9. See Katiar, p. 249 and the authorities cited therein

the same as regards the wife acting' as a manager of the household.¹

A station master or a booking or goods clerk of a railroad concern has an implied authority to bind the principal by stating what is the rate of transportation of goods or to contract to furnish a certain number of vehicles for their conveyance on a certain day or to undertake in response to a telegram to reserve accommodation for a prospective passenger but their power, in the absence of express authority to the contrary, is limited to the lines of their principal and not beyond them.²

Station
master.

A manager has generally no authority to borrow³ or to make negotiable instruments for a loan⁴ or to pledge or mortgage the property of his principal.⁵ It has been held that it is not carrying on the business of the company to pledge or mortgage the machinery and thereby suspend its operations or place them at the will and pleasure of a mortgagee.⁶ Where, however, the transaction of business absolutely requires the exercise of the power to borrow money in order to carry it on, then that power is impliedly conferred as an incident of the employment.⁷ It is to be noted that the act of borrowing must be practically indispensable to the execution of the duties really delegated in order to justify its reference from the original employment and the mere fact that it was more advantageous or convenient or effective in the transaction of the business, is not sufficient to warrant such inference.⁸ Where a manager is authorised to borrow he may generally also do all those incidental acts which generally attend such borrowing, e. g. to make negotiable instruments therefor⁹ or to pledge goods or mortgage property as security for such loan.¹⁰

Manager.

It has been held that the authority of the manager of an estate generally extends to the doing of all those acts which are necessary and are usually done for the good management of the estate affairs, such as the letting of the land for ordinary terms, collecting rents, making enhancement of rent, rejecting tenants to prevent them from acquiring a permanent right or in default of rent or on account of their being undesirable, serving notice to quit, causing distraint for arrears of rent, paying revenue and other ordinary dues on land, paying to Government or to a superior proprietor.¹¹

Manager
of an estate.

A power to a land agent to "manage and superintend estates" authorises him on behalf of his principal, to enter into

1. *Katiar*, p. 248.
2. *Katiar*, p. 251.
3. See *Mechem*, § 1001. See also *Jacobs v. Morris*, (1901) 1 Ch. 261 affirmed in (1902) 1 Ch. 816; *Harper v. Godsell*, L. R. 5 Q. B. 422; *Hussey v. Bourne*, 7 M. & W. 595 ;
4. See *Katiar*, p. 252 and the authorities cited therein. See also *Mechem*, § 998.
5. See *Mechem*, § 1004.
6. *Despatch Line v. Bellamay Mfg. Co.* 12 N. H. 205.
7. *Bickford v. Manler*, 107 N. Y. 490. See also *Brayant v. Banque du Peuple*, 1893 App. Cas. 170.
8. *Bickford v. Manler*, *supra*.
9. *Glidden Varnish Co., v. Intestate Bank*, 69 Feb. 912; *Flewellen v. Mittenenthal* 38 S. W. 234.
10. *Hatch v. Coddington*, 95 U. S. 48.
11. See *Katiar*, p. 254.

an agreement for the usual and customary leases, according to the nature and locality of the property.¹ When he holds a duly executed power of attorney an agreement to lease as well as a lease executed in pursuance thereof both are binding on the principal.² He is bound to let the land to the best advantage ; but where he has acted fairly and honestly, the mere fact of his undervaluing the land will not affect a transaction otherwise *bona fide*.³ Authority to let land need not be conferred by a power of attorney but may also be inferred from the letters and acts of the principal.⁴

Estate Agents

Estate agents as such have no general authority to enter into contracts for their employers. Their business is only to find offers and submit them to their employer for acceptance.⁵ Thus, if any authority to enter into contracts is alleged in any case, it must be proved and cannot be inferred from the relations existing between the parties.⁶

A *gomashta* employed merely to collect rents is not authorised to distrain unless he has been expressly authorised by a power of attorney. Therefore if a *gomashta*, without such express authority distrain for rent due, or pretend to be due, to his principal, the latter is not bound by his acts, unless he ratifies them, as, for example, by receiving the proceeds of the distress, knowing, that they had been obtained by distress.⁷ Such authority, may, however, be conferred either verbally or in writing.⁸ So to entitle a *gomashta* or *karinda* of a zamindar to sue no power of attorney or any other formal document conferring special power is necessary it being sufficient to prove that he fills that character.⁹ But all suits should be brought in the name of the principal and not by the agents in their own names.¹⁰ A newly appointed *gomashta* can sue for arrears of rent accrued during the term of his predecessor.¹¹

It has been held that when a person takes advantage of the management of his affairs by another, he must fulfil the engagements which that other has contracted in his name, provided such engagements be within the proper limits of the manager's authority, and be for the benefit of the estate.¹² Where, however, the engagement contracted by a manager is not for the benefit of the estate and not within the proper limits of his

1. *Pears v Sneyd*, 17 Beav. 1551.

2. *Hamilton v Clanricade*, 1 E. R. 608.

3. *Dyas v Cruise*, 2 J. & L. 460.

4. See *Katkar*, p. 253.

5. *Thuman v Best*, 97 L. T. 239 ; *Collen v Gardner*, 21 Beav. 640 ; *Durga Chandra v. Rajendra Narain Sinha*, 1923 Cal. 57.

6. *Ibid.* See also *Ridgway v. Wharton*, 27 L. J. Ch. 46, cited at p. 196, and notes at pages 194 to 197.

7. *Ranjay Mondul v. Kallymohun Roy*, Maish 282, *Kally Mohun v. Ranjoy*, 2 Hay. 289.

8. *Rughoo Nandan v. Ram Chander*, 10 W. R. 39 (F. B.). *Madhoo Soodan Singh v. William Moran & Co.*, 11 W. R. 43 ; *Gopinath v. Umakant*, 24 Cal. 169.

9. *Madho Singh v. Ganuesheelal*, 2 Agra. 275.

10. *Manohar Dass v. Kishan Dayal*, 3 N. W. P. 68, *Ladlee Pershad, v. Ganga Pershad* 4 N. W. P. 59 and other authorities cited at p. 254 of *Katkar's Law of Agency*.

11. *Madhoo Soodan v. William Moran*, 11 W. R. 43.

12. *Koora v. Robinson*, 2 Agra. H. C. Misc. 2.

authority it is not binding on the principal. Such onerous engagements as the borrowing of money on the security of the estate, making transfers of estate, except of such interest as are ordinarily done in the course of management for the good management of the estate, making wasteful grants, letting out land on extraordinary terms prejudicially affecting the estate, etc., are not within the ordinary scope of a manager's authority, unless expressly conferred, and in the absence of express authority to that effect, they do not bind the principal.¹ A transfer by a manager of an estate is, however, not void *ab initio* and becomes binding on the principal if he ratifies it subsequently.²

A general agent charged with the exclusive management of a real estate loan business which involved the examination of titles and the foreclosure of mortgages has implied authority to direct the employment of a lawyer whenever the interest of his principal demands such professional assistance.³ Thus, a general manager of a mining concern has implied authority to buy and sell personal property for use about the premises,⁴ but he cannot bind the principal for the debts of a third person.⁵ Similarly, an agent authorised to operate a shingle mill, to contract for shingle bolts, negotiate for a right of way and purchase timber, has no implied authority to bind his principal by a contract for the building of a logging road.⁶ A conductor of a railroad train, as general manager thereof, has implied authority to hire a temporary brakeman if necessary in place of one who suddenly falls ill upon the way;⁷ but he has no implied authority to hire or to bind his principal to hire labourers for construction work upon remote part of the road.⁸

(General Agent,

Section 26 of the Negotiable Instruments Act, 1881, lays down: "Every person capable of contracting, according to the law to which he is subject, may bind himself and be bound by the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque. A minor may draw, indorse, deliver and negotiate such instrument so as to bind all parties except himself. Nothing herein contained shall be deemed to empower a corporation to make, indorse or accept such instruments except in cases in which, under the law for the time being in force, they are so empowered." Section 27 of the same further prescribes that "every person capable of binding himself or of being bound as mentioned in section 26, may so bind himself or be bound by a duly

(i) Authority relating to negotiable instruments.

1. See *Turner v. Hutchinson*, 2 F. & F. 185; *Durga Chunder v. Rajendra Narain*, 1923 Cal 57; *Mohammad Hanif v. Isri Prasad*, 19 A. L. J. R. 827; *Exchange Bank v. Throver*, 118 Ga 433; *Crooke v. Wilson*, 4 L. T. 98.
2. *Mohammad Hanif v. Isri Prasad*, 19 A. L. J. R. 827.
3. *Davis v. Mathews*, 8 S. D. 300.
4. *Scudder v. Anderson*, 64 Mich. 132.
5. *Kuppe v. Edwards* 52 Mich. 411; *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644.
6. *Gregory v. Loose*, 19 Wash. 599.
7. *Georgia Pac Ry. Co. v. Probst*, 85 Ala. 203; *Newport News etc. Ry. Co. v. Currot*, 31 S. W. 132; but not where there was no emergency or usual circumstances, *St. Louis etc., Ry Co. v. Jones*, 96 Ark. 558.
8. *Olson v. Great Northern Ry. Co.*, 81 Minn. 403.

authorised agent acting in his name ;' and that a general authority to transact business and to receive and discharge debts does not confer upon an agent the power of accepting or indorsing bills of exchange so as to bind his principal ;' also that an authority to draw bills of exchange does not of itself import an authority to indorse."

Except in cases where the appointment is required by law to be in writing, no particular form of appointment is necessary to enable an agent to draw, indorse or accept bills or notes, so as to charge the principal ; he may be specially appointed for the purpose or may derive his power from some general or implied authority. In the case of an express authority to an agent, if it is in writing, it cannot be disputed by proof of contrary verbal instructions, for it proves itself when produced. Moreover, such authority will be strictly construed,¹ and very clear words will be required to empower an agent to indorse, accept or draw or make a negotiable instrument. Thus, where a principal executed a power of attorney in favour of an agent for carrying on litigation in courts, and the power of attorney concluded with the words "the executant shall accept and agree to all the acts and deeds of the agent as done by himself," it was held that the power conferred no authority on the agent to execute a note on behalf of the principal.² The authority given must also be strictly followed for, if the act of the agent is not within the scope of his authority, the holder of such an instrument cannot sue the principal upon the bill or note and the fact of the bill or note being drawn, accepted or indorsed as agent for another is itself notice to him that the agent has a limited authority.³

Though the agent may in some cases be allowed to sign the principal's name, the usual form of signature is '*per procuratione*' 'p. p.' '*per pro*,' though the delegated authority may be indicated by other words, such as "on behalf of." Where the signature to the document is made "*per pro*" or "on behalf of," the party taking such instrument is fixed with notice of the contents of the power.⁴ Similarly, an indorsement '*per pro*' puts the indorsee on inquiry as to authority.⁵ Where A. a manager in the service of the plaintiffs who were insurance brokers gave to the defendant cheques drawn '*per pro*,' the plaintiffs in payment of his (A's) racing debts, it was held that the plaintiffs were entitled to recover from the defendant the amount of the cheques received by him inasmuch as he must be taken to have had notice that the cheques were signed for purposes outside the plaintiff's business and that A had only power to draw cheques confined to that business and also as there was no evidence that the plaintiffs had held out A as having authority,

1. *Bryant v. Banque Du Peuple*, (1893) A. C. 170 ; *Jacobs v. Morris*, (1902), 1 Ch. 816 ; *Hambrø v. Burnard*, (1904), 2 K. B. 10 ; *Ghastiram v. Raja Mohan*, 6 Cal. L. J. 639 ; *Jumna Das v. Eckford*, 9 Cal. 1 ; *Krishnan v. Raman*, 39 Mad. 918.
2. *Ram Het Gir v. Banicari Lal* (1938) Lah. 41
3. *Fenn v. Harrison*, (1790) 3 T. R. 757 ; *Smith v. Prosser*, (1907), 2 K. B. 735 ; *Reid v. Rigby & Co.*, (1894), 2 Q. B. 40
4. *Sanka Krishnamurthi v. Bank of Burma*, 35 Mad. 692 ; *Stagg v. Elliott*, (1862) 12 C. B. (N. S.) 373.
5. Bills of Exchange Act, s. 25.

to draw the cheques in question.¹ In *Morison v. London County and Westminster Bank Ltd.*,² one Morison had authorised his agent to draw cheques on his behalf. The agent drew several cheques *per pro.*, and paid them into his own private account at another bank. It was held that the agent's bankers were negligent in not making inquiries as to the agent's authority to receive the cheque but it was held on the facts found in the case that the plaintiff had ratified the transactions of his agent and so could not succeed. Of course, if an agent had exceeded his authority, the principal may refuse to pay and it was held that section 25 of the Bills of Exchange Act does not apply to the proceeds of the bill paid or discharged or confer a right to recover the money once it has been paid and the transaction completed; the cause of action is said to be independent of the section.³

Special agent must, however, be distinguished from a general agent.⁴ Where the agency is specially given, the agent is circumscribed by the limits of actual authority;⁵ but if the agent be appointed as such generally, the principal is bound by all acts done by him in the course of the employment, provided they are within the scope of general authority, though they should be in violation of the private orders of the principal.⁶

Special agent

Express powers-of-attorney, though containing general words or authority, are to be construed with reference to any particular object or act specified therein.⁷ Even a ratification clause in the power whereby the principal agrees to confirm and ratify whatever the attorney should do by virtue of the power cannot enlarge the powers of agent.⁸ So, a power of attorney to pay, discharge and satisfy debts due from the testator, does not authorise acceptance of bills;⁹ nor does a power to demand and receive money and use all means for the recovery thereof (and to do all other business) confer a power to indorse a bill for the principal.¹⁰ An agent appointed to carry on litigation in civil, criminal and revenue courts cannot bind his principal by a note executed by him as agent, for the business is not one involving the executing, accepting or indorsing bills or executing notes.¹¹ Again, an authority to indorse *per pro* for the purpose of paying the bill into a bank does not enable the

Power of attorney,

¹ *Morrison v. Kemp*, (1912), 29 T. L. R. 70.

² (1914) 8 L. B. 356, appeal from (1913) W. N. 84; see also *Crumplin v. London Joint Stock Bank Ltd.*, (1913) 109 L. T. 856 (cases of collection by banker on behalf of customers); *Reckitt v. Barnett* (1929) A. C. 176; *Reckitt v. Nunburnholme* (1929) 45 T. L. R. 629.

³ *Morrison's Case* *supra*.

⁴ *Venkatramana v. Narasinga*, 38 Mad. 134.

⁵ *Fenn v. Harrison*, (1790) 3 T. R. 757; *East India Co. v. Hensley*, (1794) 1 Esp. 111.

⁶ *Smethurst v. Taylor*, (1844) 12 M. & W. 545.

⁷ *Fearn v. Filicia*, (1844) 7 M. & Gr. 513; *Jacobs v. Morris*, (1901), 1 Ch. 261; (1902) 1 Ch. 816.

⁸ *Midland Bank v. Reckitt*, (1938) A. C. 1; *Ram Het Gir v. Banwari Lal*, (1938), Lah. 41.

⁹ *Sausone Ezekiel v. Addi Raja*, 2 M. H. C. H. 177, 179.

¹⁰ *Hay v. Goldamid*, (1808) mentioned in 1 Taunt. at 349.

¹¹ *Ram Het Gir v. Banwari Lal*, (1938) Lah. 41.

agent to negotiate the bill.¹ In like manner, a power-of-attorney giving full powers as to management of real property, and in conclusion authorising the agent to do all lawful acts of whatsoever nature and kind, does not authorise the agent to indorse bills of exchange in the name of his principal.² Even a power-of-attorney in ample terms authorising the person to act as a mercantile agent does not empower him to draw or indorse bills and notes.³ So also, general powers given to a manager of a 'mine' do not justify his accepting bills of exchange;⁴ nor can a manager of a silk factory execute bills or notes for the purpose of the company under a power-of-attorney which does specially authorise him to do so.⁵ But, where the payee of certain notes gave a power-of-attorney to an agent to sell, indorse and assign, the authority of the agent was upheld, though he indorsed the notes by way of security for a loan made to him.⁶

Mala fides of the agent does not affect the title of a holder in due course,⁷ as such *mala fides* "relate to the purpose of execution, and not to the power itself. The fact that the agent abuses his authority or betrays his trust⁸ or acts in excess of his authority⁹ cannot affect *bona fide* holders for value of bills indorsed by him, apparently in accordance with the authority. Though the indorsee's title must depend upon the authority of the indorser, it cannot be made to depend upon the purposes for which the indorser performs his act under the power."¹⁰ The rule is different if the person took the instrument with notice of the agent's *mala fides*.¹¹ A solicitor empowered to draw cheques on his client's account and to apply the money to the purposes of the client, is not authorised to draw cheques as agent of the client for his own benefit, that is, to reduce his own overdraft with the bank; and the bank who collected these cheques and had the benefit of them was not allowed to retain it, as the form of the cheques itself was notice to the bank who must be therefore treated to have acted negligently in not making inquiries as to the extent of the solicitor's authority.¹²

Construction
of authority.

The authority to bind the principal by drawing, accepting or indorsing negotiable instruments is so important that the law does not allow it to be lightly inferred. "It is perfectly understood," says Hiscock J., "as a matter of ordinary business,

1. *Gumpertz v. Cook*, (1903) 20 T. L. R. 106.
2. *Esdale v. La Nauze*, (1835) 1 Y. & Cal. 394; *Davidson v. Stanley*, (1841) 2 M. & Gr. 721; *Satya Priya Ghoshal v. Gobindmohun*, 14 C. W. N. 414.
3. *Pestonjee v. Gul Mohammad*, 7 M. H. C. R. 369.
4. *Hautayne v. Bunne*, (1841) 7 M. & W. 595, 599; *Dickinson v. Valpy*, (1829) 10 B. & C. 128, 137.
5. *Ferguson v. Um Chand*, 33 Cal. 343, 347.
6. *Bank of Bengal v. Macleod*, 5 M. I. A. 1; *Bank of Bengal v. Fagan*, 5 M. I. A. 27; *Bank of Bengal v. Ramanathan*, 43 Cal. 527 (P. C.).
7. *Cf. Jonmenjoy v. Watson*, (1884) 9 A. C. 561.
8. *Bryant v. La Banque*, (1893) A. C. 170; *Slingsby v. District Bank Ltd.*, (1932) 1 K. B. 544.
9. *Brooksbey v. Temperance Building Society* (1895) A. C. 173.
10. *Per Lord Brougham in Bank of Bengal v. Fagan*, 5 M. I. A. 27, 40; *London Joint Stock Bank v. Simmons*, (1892) A. C. 201.
11. *Muttyloff Seal v. Launcelet*, 5 M. I. A. 328.
12. *Midland Bank v. Reckitt*, (1933) A. C. 1.

observation and experience, that almost the last authority which a man confers upon his agent is the right to bind him by signing or endorsing his name upon negotiable paper. Very naturally men are reluctant to confer upon others an authority which if misused may be so injurious as this. I think the Courts have respected and followed the general course and conduct of business men in dealing with this subject, for they have always been slow to infer a power to perform such acts unless it was clearly given or fairly to be implied."¹ Authority to bind the principal as a party to a negotiable instrument is authority to bind him separately and not as co-partner with another. So strict is the construction of the authority given to agents, that the authority to draw a bill is not of itself an authority to indorse² or to accept one.³ Authority to indorse does not imply authority to accept a bill. The authority of an agent to receive payment by getting the acceptance of the debtor to a bill drawn in blank, does not carry with it an authority to him to draw the bill payable to his own order.⁴ Authority to draw, indorse, or accept and negotiate on behalf of a company does not empower the agent to draw on the Company with a view that the proceeds of such drawing may be placed to his general account, so that from such account general advances may be made by the company; for if the agent failed, the company stands to lose the benefit of the bill;⁵ nor does such authority authorise him to draw promissory notes in favour of his own firm⁶ or for the accommodation of another;⁷ though such a power may be inferred from a power to sign promissory notes jointly with others.⁸

The authority to an agent may be inferred from the circumstances of the case, but evidence of such implied authority must be extremely clear. There is no room for such implication in favour of a person cognisant of the express powers.⁹ If a principal stands by and tacitly concurs in the act of the agent signing his name, he is bound, just as if he had authorised the agent to do so.¹⁰ Again, authority may be implied from the course of business or employment or from repeated recognition by principal of the agent's authority. So, where a person had upon former occasions paid several bills accepted in his name by a third party, it was held to be evidence of authority to that party so as to render the person liable on a bill accepted by such person without authority.¹¹ This was held to be so, in spite of

Authority implied.

1. Per Hiscock, J, in *Morris v. Hofferberth*, 81 N. Y. App. Div. 512.
2. Cf. *Lewis v. Reilly*, (1841) 1 Q. B. 349.
3. *Robinson v. Yarroue*, (1817) 7 Taunt 455; *Murray v. East India Co.*, (1821) 5 B. and Ald. 204; *Atticood v. Munnings*, (1827) 7 B. and C. 278; Cf. *Prescott v. Flinn*, (1832) 9 Bing. 12.
4. *Hogarth v. Wherley*, (1875), L. R. 10 C. P. 630.
5. *The Oriental Bank Corpn. Ltd., v. The Burre Tea Co., Co. Ltd.*, 9 Cal. 880.
6. *Sanka Krishnamurthi v. The Bank of Burmah*, 35 Mad. 692.
7. *Imperial Bank of India v. Veerappa*, 67 M. L. J. 573.
8. *Bank of Rangoon v. Somasundram*, 26 I. C. 253.
9. *Pestonjee v. Gool Mahomed*, 7. M. H. C. R. 369.
10. *Barlow v. Bishop*, (1801) 1 East 432; *Lord v. Hall*, (1849) 8 C. B. 627.
11. *Barber v. Gingell*, (1800), 3 Esp. 60; *Prescott v. Flinn*, (1832) 9 Bing. 19; *Neal v. Froing*, (1793) 1 Esp. 61; but see *Prema Vat Henna Vat v. T. H. Brown*, 10 B. H. C. R. 319; see also *Hogarth v. Wherley*, (1875) 10 C. P. 630; *Morris v. Behall*, (1869) L.R. 5 C.P. 47; *Bank of Bengal v. Ramnathan*, 43 Cal. 527 (P.C.).

a private remonstrance by the principal to the agent.¹ In the same way would an admission by the defendant of liability on another bill accepted by a third party having general authority be evidence that another bill also was accepted under authority.² But in order to raise this presumption of the agent's authority by reason of his having similarly indorsed or drawn on former occasions, it must be distinctly shown that the principal knew or had the means of knowing that fact;³ it must further appear that the party taking the bill or note took it on the faith of those prior transactions.⁴ Such authority is not, however, to be implied from a mere general authority to transact business, and to receive and discharge debts. In this respect, it is an exception to the general rule that an agent having authority to carry on business has authority to do every lawful thing necessary for the purpose.⁵

It is to be noted that the second paragraph of section 27 of the Negotiable Instruments Act, 1881, speaks only of accepting or indorsing bills of exchange. The non-mention of making a note or drawing a bill is immaterial, as the maker's liability is analogous to that of an acceptor and that of the drawer's, much the same as an indorser's liability.⁶

Parties dealing with an agent assuming to be authorised to draw, accept or indorse negotiable paper, must see that his authority is adequate, and both they and the agent must keep strictly within the limits of agent's authority.⁷ So authority to draw and discount a note for a given purpose implies no authority to draw and discount one for another, and different purpose.⁸ Authority to bind the principal for a particular sum does not authorise the agent to bind him for a greater sum.⁹ A power of attorney "to draw, sign and indorse notes, cheques or bills of exchange in the course of the principal's business and with one particular bank" does not authorise the agent to execute notes to a totally different bank for money borrowed to be used in his own business.¹⁰ Authority to do all things at a particular bank which the principal himself could do if present, or to draw cheques and notes payable at any bank where the principal has an account, does not authorise the agent to draw in the former case from another bank at which the principal has an account,¹¹ and in the latter case to make a note payable at a bank where the principal has no account.¹²

1. *Edmunds v. Rushell*, (1865) L. R. 1 Q. B. 97.

2. *Deuellyn v. Winchworth*, (1845) 13 M. & W. 721.

3. *Davidson v. Stanley*, (1841) 2 M. & Gr. 721.

4. *Cash v. Taylor*, (1830) 8 L. J. (O. S.) K. B. 262.

5. *Murray v. East India Co.* (1821), 5 B. & Ald. 204; *Hogg v. Sneath*, (1808) 1 Taunt. 347, *Eddale v. La Nruze*, (1835) 1 Y. & Cal. 398.

6. See *Bhashyam and Adiga's Negotiable Instruments Act*, 8th Edn., pp. 194 to 199.

7. *Mechem*, 8. 77.

8. *Callender v. Golsan*, 27 La. Ann. 311; *Nixon v. Palmer*, 8 N. Y. 398.

9. *Blackmail v. Ketcham*, 52 Ind. 184; *King v. Shaska*, 77 Ga. 285; *Fatty v. Carswell*, 2 Johns (N. Y.) 48.

10. *Citizens' Savings Bank v. Hart*, 32 La. Ann. 23.

11. *Sims v. United States Trust Co.*, 108 N. Y. 372.

12. *Craighead v. Patterson*, 28 Am. Rep. 160.

Authority to draw on the principal's funds does not empower the agent to draw on the principal's credit.¹ Similarly, authority to draw cheques on a bank for property purchased by the agent does not imply authority to borrow money, nor an authority to execute a note authorises the agent to renew it. An authority to make a note for a given time does not authorise the making of a note for a different time unless it is shown that the time limit was not of the essence of the authority or the variation was insignificant. So also authority to issue bonds does not justify the issuing of notes; nor does an authority to indorse empower the agent to accept a bill or make a joint and several note.²

Authority to draw bills payable on time or at sight does not imply authority to draw post-dated bills.³ Authority to execute a note does not of itself imply an authority to receive a demand of payment or to pay it,⁴ or receive notice of dishonour.⁵ Authority to make a particular draft on the principal payable to the order of the court does not empower the agent to make it payable to the bearer.⁶

A principal who delivers to his agent negotiable paper executed in blank to be filled up by the agent according to certain instructions is liable to those who take it in good faith for value and without notice if the agent fills up the blanks and negotiates it to them in violation of his instructions.⁷ If, however, such third persons do not take the paper for value or have notice of the instructions they are not protected.⁸ Whether mere knowledge that the paper was delivered to the agent in blank is enough to put third persons on guard and to inquire as to the instructions is a question upon which opinions have differed but the better opinion seem to be for the negative.⁹ So a party giving another his blank acceptance authorises him to fill it up with any sum covered by the stamp and negotiate it and is liable thereupon in the hands of a *bona fide* holder, notwithstanding any limitation of authority in point of time or otherwise as between himself and the party to whom he delivers it.¹⁰ But giving a blank acceptance is only *prima facie* evidence of an authority to the person to whom it is given to fill up the bill for the amount to which the stamp extends and where the holder of such bill takes it with notice of a circumstance rousing suspicion he is in no better position than a drawer or indorser without value.¹¹ A mere mention of the sum for which the instrument is given in blank on the margin of it and not in the body which is fraudulently altered by the agent into the sum

Authority to fill up blanks in a negotiable instrument,

1. *Breed v. First Nat. Bank*, 4 Colo. 481.

2. See Katlar, p. 270, and the authorities cited therein.

3. *New York Iron Mines v. Citizens' Bank*, 44 Mich. 344; *Forsner v. Macreth*, L. R. 2 Exch. 163.

4. *Luning v. Wise*, 64 Cal. 410.

5. *Bank of Mobile v. King*, 9 Ala. 279.

6. *Commercial Assurance Co., v. Hector*, 55 Ark. 690.

7. See Katlar, p. 271 and the American authorities cited therein.

8. *Davidson v. Lanier*, 182 Ed. 377; *Johnson v. Blasdale*, 40 Am. Dec. 85.

9. See Katlar, p. 271.

10. *Montague v. Perkins*, 21 L. J. C. P. 187.

11. *Hatch v. Searles*, 14 L. J. Ch. 22; *Lloyds Bank v. Cooke*, 96 L. T. 715.

which he enters in the instrument is not a notice to subsequent *bona fide* holders to protect the principal from liability.¹ So also lapse of time in such cases is only evidence of a limitation of authority as between the blank acceptor and the party to whom he delivers it and does not disprove the authority to negotiate the bill after lapse of unreasonable time, if, upon the face of the bill, no such lapse of time appears.² Where blank promissory notes are delivered to a person by a person going to a distant country with instructions to be filled up and used when the latter advises the former to do so and the former without being so advised fills up the blank and negotiates some of them to persons who take them in good faith for valuable consideration and misappropriates the money the question arises as to which of the two innocent persons must bear the loss. A distinction seems to have been drawn between a mere custodian of the blank paper and an agent authorised *ab initio* to negotiate such paper, and it has been held that the person delivering the blank paper is liable only in the latter case and not in the former.³

(j) Authority relating to arbitration.

An authority appointed to act generally for the principal cannot refer to arbitration unless authorised by his power of attorney to do so.⁴ In the absence of the principal's instruction to the contrary a solicitor or a counsel in charge of the conduct of a case has implied authority to refer the subject-matter of the case to arbitration.⁵ But this authority is limited to the subject-matter of the case in which he is engaged⁶ and exists only when there are no instructions to the contrary.⁷ He has no authority to refer against the wishes of his client or upon terms different from those upon which his client has authorised him to do so.⁸ If he does so against the wishes of his client or upon terms other than those upon which he was authorised to do so, the reference may be set aside although such limit on the counsel's authority was not made known to the other party when the reference was made.⁹ A *vakil*,¹⁰ pleader,¹¹ or *mukhtar*,¹² has no authority to refer to arbitration unless he is specially authorised to do so by his power of appointment. The Punjab Chief Court held that a recognised agent of a party has implied authority to refer to arbitration.¹³

1. *Garrard v. Lewis*, 10 Q. B. D. 30.

2. *Montague v. Perkins*, *supra*.

3. *Smith v. Prosser*, 97 L. T. 155. See also *Union Credit Bank v. Mersey Docks & Harbour Board*, 81 L. T. 44.

4. *Per Turner and Brodhuist, J. J. in Thakoor Pershad v. Kalka Pershad*, 6 N. W. P. H. C. R. 210.

5. *Fayell v. Eastern Counties Rail Co.*, 17 L. J. Ex. 297; *Smith v. Troup*, 7 C. B. 757; *Strause v. Francis*, L. R. 1 Q. B. 379; *Mathews v. Munster*, 20 Q. B. D. 141; *Swinfen v. Lord Chelmsford*, H. & N. 890; *Nundo Lal Bose v. Nistarni Dassee*, 27 Cal. 428; *Jang Bahadur Singh v. Shankar Rai*, 13 All. 272.

6. *Ellender v. Wood*, 4 T. L. R. 680.

7. *Neale v. Gordon Lennox*, 87 L. T. 341.

8. *Ibid.*, per Halsbury, L. C.

9. *Neale v. Gordon Lennox*, 87 L. T. 341.

10. *Bhut Nath v. Ramlal*, 6 C. W. N. 82.

11. *Sheo Das v. Brij Nandan*, 7 C. W. N. 343; *Ram Jwan v. Kals Charan*, 29 All. 429; *Shiblal Chaturbhuj*, 31 All. 450; *Terarr v. Tapescuar*, 45 I. C. 321.

12. See Katar, p. 274.

13. *Ram Das v. Abbas Khan*, 51 P. R. 1893; *Choohr Singh v. Jeet Singh*, 64 P. R. 1870; *Hari Singh v. La-hmi*, 1 P. R. 1882.

If a party acquiesces in an unauthorised reference to arbitration by his subsequent conduct, he cannot resile from it.¹ Consequently, where an agent not authorised to apply for or consent to a reference did apply for a reference to arbitration and the principal having been aware of the proceedings tacitly ratified the action of the agent, it was held that the legality of the award could not be questioned by him.² So also where parties to a suit agreed through their attorneys to refer the suit to arbitration and the Judge's order was by consent of both attorneys signed in order to carry out that agreement, the defendant was present at two meetings of the arbitrators, but after that he changed his attorney and objected to the reference proceeding further, on the ground that he did not give a special authority to his attorney to sign the consent order, it was held that when a party saw an order of reference and allowed his attorney to consent to it, and did not question it at the time he came to know of it but allowed it to proceed and himself took part in the proceedings, he was estopped from denying the authority in the attorney to refer to arbitration and his conduct was a sufficient authorisation.³ In *Unniraman v. Chattan*,⁴ where reference was made by a pleader without special authority by his client in that behalf, and an award and decree followed without any objection on the part of the client as to the pleader's authority to refer, it was held that such decree could not be set aside.

As it is necessary and useful for all persons who sell produce to European firms on *Karachi pass terms* to bind themselves by an arbitration clause under which all disputes are referred to two European merchants in Karachi, an agent who has authority to enter into such a contract has also authority to sign the ordinary form of contract which includes a reference to arbitration.⁵ An agent who is authorised to underwrite and settle losses for another has implied authority from him to refer a dispute about a loss to arbitration.⁶

An authority to collect debt does not, however, imply an authority to submit the claim to arbitration;⁷ nor does an authority to sell land imply an authority to agree to a reference to arbitration of and dispute which may arise out of the transaction.⁸ The authority of a factor⁹ or broker¹⁰ does not include a power to submit to arbitration any dispute which may arise out of the transaction.

1. *Saturjit Partap Bahadur Sahi v. Dulhin Gulab Kuar*, 24 Cal. 469 ; *Bhannal v. Mathradas*, 1 Bom. L. R. 261.
2. *Saturjit v. Dulhin Gulab Kuar*, *supra*.
3. *Bhannal v. Mathradas*, 1 Bom. L. R. 261.
4. 1 L. R. 9 Mad. 451. See also *Larmibai v. Hajee Widina*, 23 Bom. 629 ; *Abdul Hameed v. Riazuddin*, 30 All. 32. But see *Sheo Dass v. Brajnandan*, 7 C. W. N. 343 ; *Beni Madhub v. Preo Nath*, 28 Cal. 303.
5. *Louis Dreyfus & Co., v. Araromal*, 4 I. C. 1151 ; see also *Thomas Betram Shimwell v. Beniram Govindram*, 1 I. C. 937.
6. *Gondson v. Brooke*, 4 Camp. 163.
7. *Manufacturers, etc., Ins. Co., v. Muller*, 48 Neb. 620 ; *Mich. C. R. Co., v. Gongar*, 55 Ill. 503 ; *Allen v. Confederate Pub. Co.*, 121 Ga. 773.
8. *Talmadge v. Arrowhead Reservoir Co.*, 101 Cal. 367.
9. *Carnochan v. Gould*, 19 Am. Dec. 668.
10. *Ingraham v. Whitmore*, 75 Ill. 24 ; *Michigan Central R. R. Co. v. Gongar*, 55 Ill. 503.

Quaere: Whether the master of a ship has authority to bind the owners by submitting a claim for salvage to arbitration.¹

Other
authorities
implied.

It has been held that an authority to refer a dispute to arbitration empowers the agent to do all those acts which are necessary or incidental to the exercise of such authority, as for instance, the preparation and signing of the agreement of submission, the calling and production of witnesses, the filing of the necessary documents, the making of the necessary admissions and denials on behalf of the principal. An agent appointed to represent a party on a reference to arbitration and to conduct the reference on his behalf, though not an attorney, has authority to bind his principal by waving an objection to an improper appointment of an umpire by lot.²

(k) Authorities
relating to
legal
proceedings.

The Code of Civil Procedure prescribes that any appearance, application or act in or to any Court,' required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force be made or done by the party in person or by his recognized agent, or by a pleader appearing, applying or acting on his behalf; Provided that any such appearance shall, if the court so directs, be made by the party in person.³ According to it, the recognized agents of parties by whom such appearances, applications and acts may be made or done are—

- (a) persons holding powers-of-attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties ;
- (b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts.⁴

It has been held that an agent contemplated by this rule is one who has an initiative and independent discretion although it is subject possibly to the principal's general orders prescribed for his guidance. Thus, a mere servant employed to carry out or to execute a particular commission or a factor or commission agent who is not identified with the firm for which he acts, is not such an agent.⁵ For the recognition of an agent not holding a power of attorney non-residence of the principal within the local limits of the jurisdiction of the court is essential. So the *minim* of a firm is not the recognised agent of a partner who is present within the jurisdiction⁶ while the *minim* of a firm whose partners do not reside within the jurisdiction is such recognized agent even though the firm has ceased and he

1. The city of Calcutta case, 79 L. T. 517.

2. *Backhouse v Taylor*, 20 L. J. Q. B. 238.

3. O. 3, R. 1, C. P. C.

4. O. 3, R. 2, C. P. C.

5. *Gokul Das v. Gunesch Lal*, 4 Bom. 415

6. *Bishandas v. Luckmichand*, 6 Bom. H. C. R. 150

is only engaged in collecting the assets. As such he can maintain and defend suits in respect of the business of the firm.¹

Where a person carried on the litigation on behalf of another up to the High Court and obtained a decree without any objection as to his authority being raised by the other party, it was held that the judgment-debtor could not raise an objection as to his authority as recognized agent in the execution proceedings.² Where an act purporting to have been done under a power of attorney is challenged as being in excess of the authority conferred by it, it is necessary to show that on a fair construction of the whole instrument the authority in question is to be found within its four corners either in express terms or by necessary implication.³ But the objection should be taken at the earliest opportunity. So where the defendant failed to take objection in the court below that a power of attorney constituting a recognized agent was not valid it was held that he must be deemed to have waived the objection and could not be allowed to raise it for the first time in appeal.⁴

The term "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court.⁵ No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorised by or under a power-of-attorney to make such appointment. Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.⁶ The deed of appointment herein referred to is generally called *vakalatnama* and therefore anything done by such pleader is invalid.⁷ According to some authorities this defect can be removed by subsequent amendment by inserting the name of the pleader and such amended *vakalatnama* has a retrospective effect and validates all the acts previously done by such pleader.⁸

Processes served on the recognized agent of party are as effectual as if the same had been served on the party in person unless the Court otherwise directs. The provisions for the service of process on a party to a suit apply to the service of

Authority
to receive
process

1. *Tukaji Maharaja Holkar v. Ptambar Das*, 9 Bom. H. C. R. 427.

2. *Parvatibai v. Vinayak*, 12 Bom. 58.

3. *Roy Radha Kissen v. Nauratan Lal*, 5 Cal. L. J. 490; *Ghasiram v. Raja Mohan Bikram*, 6 Cal. L. J. 639.

4. *Gopal Singh v. Bhaga*, 69 I. C. 365.

5. S. 2 (15), Civil Procedure Code, 1908.

6. See O. 3, R. 4, C. P. C.

7. See *Mohammad Ali Khan v. Jas Ram*, 36 All. 46; *Mahfoozul Haq v. Muzharul Haq*, 41 I. C. 685; *Masumbai v. Dongar Singh*, 55 I. C. 415. See, however, *Chhayemunnassa v. Kazi Basirar*, 37 Cal. 399, where the *vakalatnama* was allowed to be amended and to have a retrospective effect after such amendment.

8. *Chhayemunnassa v. Kazi Basirar*, 37 Cal. 399; *Maharashtriyu Juan Kosh Mandal v. Birju Lal*, 71 I. C. 36.

process on his recognized agent.¹ But besides the recognized agents any person residing within the jurisdiction of the court may be appointed an agent to accept service of process and such appointment may be special or general, but must be made by an instrument in writing signed by the principal and such instrument, or if the appointment is general, a certified copy thereof must be filed in Court.² Service on a *mukhtar* is not sufficient unless he is specially authorised in that behalf.³ So also service of an order of the Court on an attorney's clerk is not good service on the attorney himself.⁴

Any process served on the pleader of any party or left at the office or ordinary residence of such pleader and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes if the same had been given to or served on the party in person.⁵ When a legal practitioner is in charge of the conduct of a case his agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings.⁶ The Crown pleader in any Court is to be deemed to be the agent of the Crown for the purpose of receiving processes against the Crown issued by such Court.⁷

Persons merely looking after the affairs of a party are not such agents on whom service of summons will be sufficient under the provisions of the Civil Procedure Code relating to the service of processes.⁸ In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who at the time of service personally carries on such business or work, for such limits, shall be deemed good service. For the purpose of this rule the master of a ship is deemed to be the agent of the owner or charterer.⁹ Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the party.¹⁰ Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him. A servant is, however, not such member.¹¹

1. See O. 3, R. 4, C. P. C.

2. See O. 3, R. 6, C. P. C.

3. *Kristo v. Fuzul Ali*, 17 W. R. 389.

4. *Ernst Lal Saligram v. Kidd*, 2 Hyde 116. See O. 3, R. 5, C. P. C.

5. See O. 3, R. 5, C. P. C.

6. *Rampal v. Balbhaddar*, 25 All. 1 (P. C.); but see *E. F. Sandys v. Upendra Chandra*, 13 C. W. N. 142.

7. O. 27, R. 4, C. P. C.

8. *Ram Soonduree v. Surat- Soonduree*, 17 W. R. 33.

9. O. 5, R. 13, C. P. C.

10. O. 5, R. 14, C. P. C.

11. O. 5, R. 15, C. P. C.

Authority
to sign
and verify
pleadings.

Every pleading is to be signed by the party and his pleader (if any) : provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same, or to sue or defend on his behalf.¹ So also, save as otherwise provided by any law for the time being in force, every pleading is to be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.²

A plaint signed by the authorised agent of the plaintiff is valid in law unless it is shown that the suit has not been instituted with the approval of the plaintiff.³ A plaint signed by a person holding a general power of attorney to sue on behalf of the plaintiff is properly signed within the meaning of the proviso, but the Court must be satisfied that a person other than the plaintiff who verifies the plaint is acquainted with the facts of the case.⁴ Even an agent authorised merely to enter appearance can sign amended plaint where once the suit has been instituted with the approval of the plaintiff.⁵ A person in jail who is unable to sign a plaint may authorise some other person to sign it for him.⁶ Where a plaint is signed by a third person on instructions from the real and ostensible plaintiff, it must be deemed to be signed by a duly authorised agent.⁷

Mere absence is no good cause for not signing. It is only absence of such a kind as makes signature impossible which should justify a signature by another person. But it is a matter of discretion of the Court to decide when a sufficient cause exists and when it does not exist.⁸ The verification should be made by some person acquainted with the facts of the case, and such person must satisfy the Court by an affidavit that he is acquainted with the facts of the case.⁹

Objection to verification should be taken before the settlement of issues and after that the case should be tried on its merits and not dismissed for insufficient verification.¹⁰ The proper procedure in cases where the verification is challenged is not to frame any issue but to decide the preliminary question as to the validity of the plaint first. But if issues have been as a matter of fact framed this does not stand in the way of the return of the plaint for amendment.¹¹

Ordinarily a plaint or written statement need not be verified in the presence of an officer of the Court; but where it is

1. O. 6, R. 14, C. P. C.

2. O. 6, R. 15, C. P. C.

3. *Amirunnessa v. Raicharan*, 31 I. C. 859.

4. *Kastalino v. Rustomi*, 4 Bom. 468; *Manohardas v. Ramnatar*, 25 All. 431.

5. *Palaniappa v. Firm*, 25, I. C. 136.

6. *Bishresh Nath v. Emperor*, 40 All. 147.

7. *Ali Ahmed, v. Abdul Ghani*, 75 I. C. 880.

8. *Chandra v. Ganpat*, 4 Nag. L. B. 117.

9. O. 6, R. 15, C. P. C.; see also *Bakar Sajjad v. Udit Narain*, 26 All. 154.

10. *Shama Soonduree v. Rahimudin*, 24 W. R. 71. *Ganga Suhai v. Mohammad Ali*, 22 All. 444 (note); *Smt Bhushan v. Rasik*, 17 C. W. N. 989.

11. *Kastalino v. Rustomji*, 4 Bom. 468.

verified by some person other than the party it is desirable that the verification by such person should be made in the presence of the Court unless the Court is satisfied that there is sufficient ground for dispensing with this procedure. Where the plaintiff contains statements of a scandalous nature, or where the plaintiff sets up gross fraud, or where the case is based upon the personal knowledge of the plaintiff it is imperative on the plaintiff or at least one of them, (where there are many) to verify the plaint.¹ In a suit brought by a firm one partner can without having obtained special leave verify the plaint on his own behalf and also on behalf of his co-partner.²

Authority
to make
admissions

Statements made by a party to a proceeding, or by an agent to any such party, whom the court regards under the circumstances of the case as expressly or impliedly authorised by him to make them, are admissions.³ "Where," says Mr. Justice Story, "the acts of the agent will bind the principal there his representations, declarations and admissions respecting the subject-matter will also bind him if made at the same time and constituting part of the *res gestae*. In a suit against a railroad company by a passenger for the loss of his trunk, the admissions of the conductor, baggage-master, or station-master as to the manner of the loss, made the next morning in answer to enquiries for the trunk, are competent against the company, it being part of the duties of such agents to deliver the baggage of passengers and to account for the same if missing, and enquiry is made within a reasonable time".⁴

As a rule both in England and America the admissions of an agent have been held binding on the principal only when they have been made during the continuance of the agency in regard to transaction then pending, and when they have been made within the scope of the agent's authority.⁵ A statement of an agent who is expressly or impliedly authorised to make it is admissible in evidence even though not made on oath.⁶ The fact of agency must however be proved before such statement is admitted in evidence.⁷

Counsel,⁸ solicitors,⁹ and pleaders or vakils¹⁰ have an implied authority to bind their clients by admissions of fact, provided such admissions are made during the actual progress of litigation and not in mere conversation.¹¹ A verbal admission

1. *Harjeshwar v Budhanuddi*, 6 Cal 268 (279), *Pratap Chandra v Krist Kishore* 8 Cal 885; *Raja of Tanjore v Branthwood*, 9 All 505, *Jardine Skinner & Co., v Shunomoyee*, 24 W R. 215.
2. *Ram Chandra v Choonee Lal*, 12 B L R 35
3. S 18, clause (1), Indian Evidence, Act, 1872
4. Story on Agency, § 134
5. See Katiar, p. 242. Field on Evidence, p. 44.
6. *Gomdji v. Chhotatal*, 2 Bom. L. R. 651.
7. *Ram Bala Lal v. Kishore Mohan Saha*, 3 B L R (O C J.) 273
8. *Haller v. Woman* (1860) 2 F & F 165; *Stracy v. Flake* (1836) 1 M. & W. 168.
9. *Wagstaff v. Weston*, (1833) 4 B & Ad. 339; *Patch v. Lyon*, (1846), 9 Q. B. 147
10. *Kauser Narain v Sreenath* (1868) 9 W. R. 485; *Rajinder v. Aizai* (1839), 2 M. L. A. 181, 339. *Hangan Lal v. Mansa Ram*, (1896), 18 All. 384, *Venkata v Bhashyakurli*, (1899) 22 Mad 538.
11. *Young v Wright*, (1807) 1 Cam. 139; *Parkins v. Hauleshaw* (1817) 2 St. 239, *Patch v. Lyon* (1846) 9. Q. B 147.

by a pleader must be taken as a whole and must not be unduly pressed;¹ but an admission of liability by a vakil is sufficient to warrant a decree against his client in the suit.² The result is that the client will be bound by the admission even though it may be erroneous. But counsel, solicitor, or vakil cannot bind his client by an admission on a point of law. Hence if the admission be erroneous, the client is free to repudiate it.³ It may here be observed that the omission of a pleader or counsel to argue a question of law, or his abandoning a question of law does not preclude the Court from dealing with the question.⁴ A client is not bound by the mistaken consent of his pleader to abide by issues of law erroneously framed by the Judge;⁵ nor by an adverse opinion expressed on a point of law in a cause. In such cases he is not precluded by such admissions by his agent at law from asserting the contrary in order to obtain the relief to which upon a true construction of the law he may appear to be entitled.⁶ Where a pleader authorised to conduct the defence in the usual manner pledged his client to relinquish his defence if the plaintiff would assert on oath that the defendant was not the owner of the property in dispute, it was held that he had exceeded his powers and that his client was not bound by his act.⁷ So also a pleader's act was held to be unauthorised where on the remand of a case by the High Court he gave up part of the claim;⁸ or where he undertook that his client would give up the claim if a certain paper not then on the record could show that the land in dispute was surveyed as part and parcel of the opposite party's *taluk*.⁹

The rules herein laid down as to the binding character of the admission of fact made by an agent apply only to the civil cases and not to criminal cases where principal is the accused in the case.¹⁰ Authorities on this point, however, are not uniform. In England the rule has been stated to be that in a trial for felony the prisoner (and therefore also his counsel, attorney or vakil) can make no admissions so as to dispense with proof, though a confession may be proved against him, subject to the rules relating to the admissibility of confessions. In such cases the Judges at the Assizes do not allow even counsels to make any admissions. In a case also of indictment for a misdemeanour where the attorneys on both sides had agreed that formal proof should be dispensed with and part of the prosecutor's case admitted Lord Abinger, C. B., refused to allow such admissions to be made on the part of the accused unless they were made at the trial.¹¹

Criminal cases.

1. *Nathu v. Jodha*, (1834) 6 All. 406.
2. *Sreemutty Dussay v. Pitamber*, (1874), 21 W. R. 332.
3. *Dwar Bux v. Fatsk*, (1898) 3 C.W.N. 222 (Pleader); *Beni Pershad v. Dudhnath* (1900) 27 Cal. 156, 26 I. A. 216 (counsel); *Krishnaji v. Rajmat* (1899) 24 Bom. 360, 363; *Narayan v. Venkatcharya*, (1804) 28 Bom. 408.
4. *Beni Pershad v. Dudhnath*, (1900) 27 Cal. 156.
5. *Krishnamuni v. Rajagopala*, 18 Mad. 73.
6. *Jotendra Mohan Tagore v. Ganendra Mohan Tagore*, 18 W. R. 367.
7. *Hukimunnissa v. Baldeo*, 5 N. W. P. H. C. R. 309.
8. *Abdul samad v. Sib Kishore*, 3 B. L. R. App. 15.
9. *Chandra v. Sadakat*, 18 W. R. 436.
10. *Queen v. Kazim Mandal*, 17 W. R. (Cr.) 49; *R v. Downer*, 14 Cox C. C. 486.
11. See Katiar, pp. 283, 284, and the authorities cited therein.

Authorities
to compro-
mise.

As already noted, an agent put in charge of the conduct of a case has no power to compromise the case unless he is specially authorised to do so. An attorney or solicitor is entitled in the exercise of his discretion to enter into a compromise on behalf of his client, if he does so in a *bona fide* manner¹ And so is counsel.² But a pleader cannot enter into a compromise on behalf of his client without his client's express authority.³ The reason is that both counsel and solicitor have an *implied* authority to compromise, the former by reason of his *retainer*, and the latter by virtue of his position of *agent* in relation to his client.⁴

The result is that the consent of the client is not needed for a matter which is within the ordinary authority of counsel, and if a compromise is entered into by counsel, it binds the client though his consent was not taken.⁵ But what if the authority of counsel has been expressly limited by the client, and counsel consents to an order or decree in spite of the dissent of the client, or on terms differing from those which the client authorised? In such a case, if the limitation of authority is communicated to the other side, consent by counsel outside the limits of his authority is of no effect.⁶ If the limitation is not communicated to the other side, the question arises whether, having regard to the fact that the other side entered into the compromise believing that the opponent's counsel had the ordinary unlimited authority, the Court has power to interfere. It was held by the House of Lords that it has, and that it is not prevented by the agreement of counsel from setting aside or refusing to enforce the compromise; that it is a matter for the discretion of the Court, and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side.⁷

The authority of counsel and solicitor to compromise a suit is limited to the issues in the suit. A compromise will not therefore be binding on a client if it extends to matters *outside* the scope of the particular case in which the counsel or solicitor is retained.⁸ The appointment of a receiver of debutter property in a partition suit is a collateral matter and not within the scope

1. *Fray v. Voules*, (1859) 1 E & E 839, *Jagannathdas v. Ramdas*, (1870), 7 B. H. C. O. C. 79, *Little v. Spreadbury* (1910) 2 K. B. 658.
2. *Neale v. Gordon Lennor* (1902) A. C. 465; *Bahadur v. Shankar*, (1891) 13 All. 272.
3. *Jagapati v. Ekambara* (1898) 21 Mad. 274; *Thenal v. Sokkumal*, (1918) 41 Mad. 233=41 I. C. 429.
4. Counsel is not his client's agent, but solicitor is: *Matthews v. Munster*, (1888), 20 Q. B. D. 141, 142; *Jang Bahadur v. Shankar*, (1891) 13 All. 272.
5. *Matthews v. Munster* (1887) 20 Q. B. D. 141; *Jang Bahadur v. Shankar*, (1891) 13 All. 272; *Carrison v. Rodriguez* (1886) 14 Cal. 115; *Muthiah Chettiar v. Karuppan Chetti*, (1927) 50 Mad. 786=105 I. C. 5.
6. *Strauss v. Francis*, (1866) L. R. Q. B. 379, 382.
7. *Neale v. Gordon Lennor*, (1902) A. C. 465, 470; *Shepherd v. Robinson*, (1919) 1 K. B. 474; *Taru Bala Das v. Surendra Nath*, (1925) 4 Cal. L. J. 213, 218; *Chuni Lal v. Hira Lal*, 32 C. W. N. 44=106 I. C. 309.
8. *Nundo Lal v. Natarani*, (1900) 27 Cal. 428; *Swinfen v. Lord Chelmsford*, (1859) 20 T. T. (N. L.) 229.

of counsel's authority; and an arrangement for the appointment of a party's attorney as receiver interrupts the relationship of attorney and client and will be set aside.¹ A compromise effected *out of court* is also not binding upon the client,² but a compromise entered into by counsel and sanctioned by the court is not vitiated merely because counsel considered the matter in the corridor of the court or the Bar library.³ And since a compromise is no more than agreement, it can be set aside at the instance of the client if it has been made by the counsel or solicitor under a misrepresentation or mistake.⁴ The application to have the suit restored to the list shall be made before the decree is sealed.⁵ Even where there are instructions to the contrary a compromise entered into by a counsel and not objected to by the client at the earliest opportunity when it becomes known to him may become binding on him unless the opposite party had notice of such instructions.⁶

1. *Johurmull v. Kedarnath*, (1927), 55 Cal. 113=104 I. C. 387--A. I. R. 1927 Cal. 714.

2. *Askaran v. E. I. Ry. Co.*, (1925) 52 Cal. 386=A. I. R. 1925 Cal. 696=88 I. C. 413.

3. *Johurmull v. Kedarnath*, *supra*.

4. *Hickman v. Berens*, (1895) 2 Ch. 638; *Wilding v. Sanderson*, (1897) 2 Ch. 534; *Huddersfield Banking Co., v. Lister* (1895) 2 Ch. 273; *Bibee Solomon v. Abdoul Azeez*, (1881) 6 Cal. 687, 706; *Kyone Hor Tsee v. Kyon Soon Sun*, A. I. R. 1925 Rang. 314.

5. *Berry v. Mullen*, (1871) 5 Ir. Rep. 368; *Jang Bahadur v. Shankar*, (1891) 13 All. 272; *Carrison v. Rodrigues* (1896) 13 Cal. 115.

6. *Cf. Saturjit Pertap Bahadoor v. Dulhin Gulab Kunwar*, 24 Cal. 469; *Bhanmal v. Mathuradas*, 1 Bom. L. R. 269.

CHAPTER VII

RATIFICATION

43. Meaning of ratification. 44. Conditions necessary for ratification. 45. Who can ratify. 46. What acts can be ratified. 47. How an act can be ratified. 48. Effect of ratification.

43. Meaning of ratification.

Right of person as to acts done for him without his authority. Effect of ratification.

Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

(*S. 196, Indian Contract Act, 1872*).

What is meant by ratification is thus the adoption and confirmation by one person of an act done by another who has assumed to act for the former, after full knowledge of that which was done on his behalf. Where an act is done in the name or professedly on behalf of a person without his authority by another person assuming to act as his agent, the person in whose name or on whose behalf the act is done may, by ratifying the act, make it as valid and effectual as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all.¹ Where the act has been done by a person not assuming to act on his own behalf, but for another, though without his precedent authority² or knowledge,³ and is subsequently ratified by that other person, the relation of principal and agent is constituted retrospectively. In such a case the principal is bound by the act whether it be to his advantage or detriment, whether it be founded in contract or in tort, to the same extent and with all the same consequences as if the same act had been done by his previous authority.⁴

Where A enters into and signs a written contract on behalf of B, without authority, and B subsequently ratifies the contract, A is deemed to have been under the English law B's duly authorized agent within the meaning of the fourth and seventeenth sections of the Statute of Frauds and of the fourth section of the Sale of Goods Act, 1893.⁵

An agent, without authority, insures goods on behalf of his principal. The principal ratifies the policy. The policy is as valid as if the agent had been expressly authorised to insure the goods.⁶

1. See Bowstead, Art. 26, p. 41.

2. *Simpson v. Eggington*, (1855), 10 Exch. 845.

3. *Ancona v. Marks* (1862), 7 H. & N. 686.

4. Halsbury, Vol. I (2nd Edn.), Art. 396, pp. 228, 229, citing also *Wilson v. Tummam*, (1843), 6 Man. & G. 236; *Maclean v. Dunn* (1828), 1 Moo. & P. 761; *Foster v. Bates*, (1843), 12 M. & W. 226.

5. *Maclean v. Dunn*, (1828), 1 M. & P. 761; *Soames v. Spencer*, (1822), 1 D. & R. 32.

6. *Wolff v. Horncastle*, (1798), 1 B. & P. 316.

A public agent does not act in excess of his authority. The Crown ratifies the act. The act is deemed to be an act of State.¹

Ratification presupposes a subsisting contract. Hence it differs from authorisation. A contract can be authorised before it is made but it is ratified only after it is made.² Assent to a contract before it is made amounts to its actual authorisation while that given after it is made is only a ratification of what has been already done. Ratification presupposes that there was no authority. It is rather a cure for the lack of authorisation or a substitute for authorisation than the authorisation itself, for in the very nature of things there can be no authorisation to do an act after it has already been done.³ Ratification is an approval after previous act or contract, which thereby becomes the act or contract of the person approving it. It is not a contract to assume such liability. In the case of contracts, ratification is an affirmation of a contract already made and as of the date when it was made. It is neither the making of a new contract to be bound by the old one, nor the making of a new contract in the terms of the old one, but the adoption of the old contract itself as it existed as if it were made with a previous authority.⁴ *It, therefore, requires no new consideration to support it.*⁵

It is wholly optional with the principal to ratify an unauthorised act or contract made on his behalf or for his benefit. He may ratify it or he may repudiate it. He is under no legal obligation to ratify an act, no matter how advantageous such ratification may be to him or to the other party or to the agent.⁶ If he chooses to repudiate he need not assign any reason for such repudiation and an act or contract is not ratified merely because the principal assigned a reason for its repudiation which turns out to be false or untenable unless his conduct amounts to estoppel preventing him from denying such ratification.⁷

Ratification itself, however, differs from estoppel although they are often very closely associated. Estoppel requires a change of position by a party to his prejudice in reliance upon the alleged facts, which the other party is then prevented to deny in order to save the former from suffering any loss; while ratification requires no such change of position nor it is based on any prejudice to any party. As soon as an act or contract is ratified it stands on the same footing as an act or contract previously authorised, and not merely as an act or contract whose effect the principal may be estopped to deny.⁸ Where

Ratification differs from estoppel.

1. *Buron v. Denman* (1848), 2 Ex. 167; *Secretary of State for India v. Kumachee Boye Sahaba*, (1859), 7 Moo. Ind. App. 476, P. C.

2. *Atlanta v. Bollinger*, 63 Ark. 212.

3. *Mechem*, S. 348.

4. *Ibid.*, S. 350.

5. *Mechem*, S. 351; *Katnar*, p. 287.

6. *Mechem*, S. 352; *Williams v. Storm*, 46 Tenn. (6 Coldw.) 208.

7. *Brown v. Henry*, 172 Mass. 559.

8. *Mechem*, S. 349 and the authorities cited therein. See, however, *St. Louis Gunning Adv. Co. v. Wanamaker*, 115 Mo. App. 270 and *Doughaday v. Crowell*, where the Court seems to think that the question of ratification is always one of estoppel.

there is ratification there is no occasion to resort to estoppel, but there may be cases where ratification itself may arise by estoppel, i. e., where one may be estopped to deny that he has ratified.² There are other marked differences as well. For instance, ratification is retrospective while estoppel operates after the act and in reliance upon it. Ratification makes the whole act good from the beginning while estoppel may only extend to so much as can be shown to be affected by the estopping conduct of the principal.¹

44. Conditions necessary for ratification.

"On behalf
of another"

Ratification must be by the person for whom the agent professes to act. "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established principle of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority".² But "where A does an act as agent for B without any communication with C, C cannot, by afterwards adopting that act, make A his agent and thereby incur any liability, or take any benefit, under the act of A".³ Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier.⁴ Accordingly, a ratification of the unauthorised contract of an agent can only be effectual when the contract has been made by the agent avowedly for, or on account of, the principal, and not when it has been made on account of the agent himself.⁵

A man cannot adopt by ratification an act which was not authorized by him at the time and did not purpose to be done on behalf of any principal.⁶

Since a ratification is in law equivalent to a previous authority, a person not competent to authorise an act cannot give it validity by ratifying it.⁷

Again, ratification must be by an existing person on whose behalf the contract might have been made at the time.⁸ Thus, a newly-formed company cannot ratify an act done in its name before it was incorporated.⁹ And where a time is limited for doing an act, and A does it on behalf of B; but without his

1. Mechem, S. 349.

2. *Wilson v. Timman* (1848) 6 Man. & Gr. 236, at p. 243.

3. *Ibid*, head-note.

4. *Raja Rai Bhagwant Dayal Singh v. Debi Dayal Sahu* (1908), 35 I. A. 48 at p. 58=12 C. W. N. 393, at p. 408.

5. *Per Cur.* in *Shiddheshwar v. Ramchandrasan* (1882) 6 Bom. 463, at p. 466.

6. *Keoghley, Marted & Co., v. Durant* (1901) A. C. 240; *Ragharachari v. Pakkiri Mahomed* (1916) 30 Mad. L. J. 497, 501=34 I. C. 760.

7. *Irvine v. Union Bank of Australia* (1877) 2 App. Ca. 366, at p. 374=3 Cal. 280.

8. *Keiner v. Baxter* (1886) L. R. 2. C. P. 174, at p. 185.

9. *In re Empress Engineering Co.*, (1880) 16 Ch. D. 125; *Ganesk Flour Mills Co., v. Purnam Mal*, 2 P. R. 1905.

authority within that time, B can ratify it only before the time has expired.¹

The only person who has power effectively to ratify an act is the person in whose name or on whose behalf the act was professedly done, and it is necessary that he should have been in existence and capable of being ascertained at the time when the act was done; but it is not necessary that he should be known, either personally or by name, to the person doing the act.²

A sheriff, acting under a valid writ of execution, wrongfully seizes goods which are not the property of the debtor. The execution creditor cannot, by becoming a party to an interpleader issue or otherwise, satisfy the act of the sheriff so as to render himself liable for the wrongful seizure, because the act was not done by the sheriff on his behalf, but in performance of a public duty.³

A contracts on behalf of a volunteer corps with B, both parties thinking that the corps as an entity may be bound. The contract cannot be ratified by individual members of the corps, because it was not made on their behalf as individuals.⁴

A effects an insurance on goods on behalf, generally, of every person interested. Any person interested in the goods may subsequently satisfy the insurance so far as concerns his interest, and the under-writers will then be bound by the policy to that extent⁵ So, a person may act on behalf of an heir, or an administrator, or the owner of particular property, whoever he may be, though unascertained and unknown to him, and when ascertained, the person on whose behalf the act was done may ratify it,⁶ provided that he was capable of being ascertained, and was contemplated by the person doing the act at the time when it was done.⁷

A enters into an agreement professedly on behalf of B's wife and C. B cannot ratify the agreement so as to give him a right to sue upon it jointly with his wife and C.⁸

The promoters of a prospective company enter into a contract on behalf of the company before its incorporation. The company cannot ratify the contract, because it was not in existence at the time when the contract was made.⁹ The company may, of course, make a new contract on the same

Contracts made before incorporation of company.

1 *Dibbins v. Dibbins* (1896) 2 Ch. 348.

2 *Bowstead*, Art. 28, p. 43, and the authorities cited therein.

3 *Wilson v. Tunman* (1843), 6 M. & G. 236; *Williams v. Williams*, (1937) 81 S. J. 435.

4 *Jones v. Hope* (1880) 3 T. L. R. 247, n., C. A.

5 *Hagedorn v. Olverson* (1814) 2 M. & S. 285. And such ratification is good even after known loss: *Williams v. North China Insurance Co.*, (1876) 1 C. P. D. 757. But see *Boston Fruit Co., v. British and Foreign Marine Ins. Co.*, (1906) A. C. 336.

6 *Lyell v. Kennedy* (1889) 14 App. Cas. 437; *Foster v. Bates* (1843), 1 D. & L. 400.

7 *Watson v. Swann* (1862), 31 L. J. C. P. 210.

8 *Saunders v. Griffiths* (1826) 5 B. & C. 909; *Health v. Chilton* (1844), 12 M. & W. 632.

9 See *Kelner v. Baxter*, (1886), L. R. 2 C. P. 174 and the other authorities cited at p. 44 of *Bowstead's law of Agency*, 9th Edition.

terms as the old¹ or may incur an equitable liability by reason of the perception of a benefit under the contract,² or on the doctrine of part performance,³ provided that the contract is not *ultra vires*,⁴ but it cannot ratify the contract.

"Claims have often been made against companies after formation on contracts entered into by promoters for services rendered, or to be rendered. In cases where the company has been incorporated by private Act of Parliament, and the Act has provided for the payment of the formation expenses, these actions have generally been successful, even in cases where the plaintiff had given an undertaking to an individual promotor that there should be no claim if the company did not proceed with its undertaking, or where there had been a novation of the contract. But where the articles of association of a company incorporated under the Companies Act, provided for such payment, this was held to give no right to persons not members of the company; and certain cases show clearly that the claimants must look to the promoters and not to the company for payment, even for the registration fees and stamp duties.⁵

Position of
agent

When a contract is made by one who professes to be making it as agent, but who has no principal existing at the time, and the contract would therefore be wholly inoperative unless binding upon the professed agent, he must be presumed to have intended to bind himself, unless a contrary intention clearly appears from the terms of the contract; and a stranger, as a projected company subsequently incorporated is in fact, cannot by a subsequent ratification relieve him from personal liability. Even a secretary who has paid for his qualification, under an agreement with promoters, on the basis of a term appointment and salary, can only in such a case recover against the company on equitable grounds for work actually done.⁶

Other
illustrations

A is authorised to buy wheat on the joint account of himself and B, with a certain limit as to price. A intending to buy on the joint account of himself and B, and expecting that B will ratify the contract, but not disclosing such intention to the seller, enters into a contract in his own name to buy at a price in excess of the limit. B cannot ratify the contract.⁷

A bailiff may receive the rent of land on behalf of the unknown heirs of the last owner in possession, and those heirs, when their title is ascertained, can ratify his acts.⁸

A company is bound by the acts of persons who take upon themselves, with the knowledge of the directors to act for the

1. *Howard v Patent Ivory Co.*, (1888) 38 Ch D 156.
2. *Touche v Metropolitan Warehousing Co.*, (1871) L R 6 Ch. 671; *Re Dale and Plant*, (1889) 61 L T 206, *Re English and Colonial Produce Co.*, (1906) 2 Ch. 435; *Re Cinnamon Park Co.*, (1930) N. Ir 47.
3. *Howard v Patent Ivory Co.*, *supra*.
4. *Preston v L M & N Ry.*, (1856) 5 H L C. 605.
Shrewsbury v. N. S. Ry (1866), L. R 1 Eq 593.
5. *Halsbury*, vol. I (2nd Edn.) p 292 and the authorities cited therein.
6. *Ibid* p. 293.
7. *Keighley v. Durant* (1901) A. C. 240.
8. *Lyell v. Kennedy*, (1889) 14 App Ca 437, at p. 456.

company, provided such persons act within the limits of their apparent authority, and a person dealing *bona fide* with such persons has a right to assume they are duly appointed.¹ The share-holders of any company can ratify any contract which comes within the powers of the company in the memorandum of association.²

It is to be observed that a person who is not of the age of majority according to the law to which he is subject or one who is not of sound mind, is not competent to contract and, therefore, not competent to employ an agent.³ As ratification establishes the relation of the principal and agent retrospectively, it is necessary that the person for whom or on whose behalf the act is done or the contract is made, which is sought to be ratified, must be capable of doing the act, or entering into the contract itself in order to give the person who does it an authority to act as his agent.⁴ This capacity to contract must not only exist at the time when the act is done or the contract is made, but must also continue up to the time such act or contract is ratified.⁵ So if, for any reason, the contemplated principal has become, since the doing of the act to be ratified, incapable of doing the act himself and of authorising it to be done, he is incapable of ratifying it.⁶ Ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract to which by his ratification he gives validity.⁷ So principal's competency to contract or to do the act at both points of time, namely, when the act is done or the contract is made and when it is ratified, is essential for a valid ratification.⁸ Thus, it has been held under the English law, that a contract entered into on behalf of an infant, other than for necessities, will not bind the infant, nor can an infant after coming of full age ratify any contract made on his behalf during infancy, even if there is a new consideration for it.⁹

Ratification itself presupposes that the act or contract sought to be ratified is unauthorised. Where there is authorisation there is no question of ratification. The act or contract itself being authorised does not stand in need of ratification for its being binding on the person authorising the same. It is only in the case of act done without actual authority that the question of ratification arises in order to render it valid and binding on the person for whom or on whose behalf it is done.

If, before the principal has ratified the contract, the intervening circumstances change the position of the parties

The act or contract to be ratified must be unauthorised

The transaction must be subsisting at the time when it is ratified.

1. *Smith v. Hull Glass Co.*, (1849), 8 C. B. 668; (1852), 11 C. B. 897.
2. *Grant v. United Kingdom Switchback Rail Co.*, (1889) 40 Ch. Div. 135.
3. See S. 183, Indian Contract Act, 1872, and notes on pages 55 to 63.
4. See *Mechem*, S. 370.
5. *Mechem*, S. 385; *Halsbury*, Vol. I (2nd Edn.), Art. 400, p. 231.
6. *Mechem*, S. 385.
7. *Per Field J.*, in *Mc Cracken v. San Francisco*. 16 Cal. 591; Cf. *Imambandi v. Haji Muloaddi*, 45 Cal. 878 P. C.
8. *Mechem*, S. 385; *Halsbury*, Vol. I (2nd Edn.), Art. 401, p. 282.
9. *Halsbury*, Vol. I (2nd Edn.), p. 232.

in such a way that it cannot be ratified without prejudice to the other party, the law will prevent the principal from ratifying it to safeguard the interest of the innocent parties. If, for instance, A enters into a contract with B representing himself and acting for C as his agent without C's authority, but before C ratifies it B comes to know that A has entered into the contract without authority and rescinds the contract. C cannot ratify it after such rescission.¹ Where an agent without authority made a payment, but the payee discovered that the payment was unauthorised and returned the money, it was held that no subsequent ratification could defeat an action to recover the debt from the principal.² Where a policy is negotiated by a mere volunteer who surrenders it before the assumed principal knows of and ratifies it, he cannot subsequently ratify it.³ So also if third persons acquire rights after the act is done and before it has received the sanction of the principal, the ratification cannot ordinarily operate retrospectively so as to overreach and defeat those rights.⁴

Unconditional acceptance of the act by the assumed principal essential.

Ratification must not be partial.

Principal must have full knowledge of material facts.

The ratification of an act or contract is effected if the principal accepts such act or contract as effected by his agent unconditionally either expressly or by necessary implication. That such acceptance must be unconditional and unqualified is essential for a valid ratification. Where it is qualified or conditional the ratification is invalid unless the other party agrees to abide by the act or contract subject to the qualification or condition thus imposed. In the latter cases it is not ratification of the old contract but a fresh contract made between the parties themselves. So any condition imposed by the principal on the terms of the original contract vitiates the ratification. For instance, a contract cannot be ratified in part and repudiated in part. If ratified, the whole contract must be ratified, and the agency accepted *cum onere*.⁵

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

(S. 198, Indian Contract Act, 1872).

The principle by which a person, on whose behalf an act is done without his authority, may ratify and adopt it, is as old as any proposition known to the law, but it is subject to one condition in order to make it binding; it must be either with full knowledge of the character of the act to be adopted, or with intention to adopt it at all events, and under whatever circumstances.⁶ It may be stated as a universal proposition of law that in order that a person may be deemed to ratify an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances under which the act was done, unless he intend to ratify the act, and take the risk, whatever the circumstances may have been.

1. *Walter v. James*, L. R. 6 Ex. 124; *Stillwell v. Staples*, 19 N. Y. 401; *Cockerham v. Perot*, 48 la. Ann. 209.
2. *Walter v. James*, *supra*.
3. *Stillwell v. Staples*, *supra*.
4. *Mechem*, S. 385; *Wood v. Mc Cain*, 7 Ala. 800.
5. *Hordl v. Pack*, (1806), 7 East, 164; *Halsbury*, Vol. I, (2nd Edn.), p. 234; See also S. 199, Indian Contract Act, 1872.
6. Per Willes J. in *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 56.

But it is not necessary that he should have knowledge of the legal effect of the act, or of collateral circumstances affecting the nature thereof.¹ Knowledge of every detail or of every trivial circumstance is not essential, but knowledge of every fact which the issue shows to be material is, unless waived, required in order to hold the alleged principal responsible.²

It is thus clear that where the supposed ratification relates to acts as to which there is no pretence of any prior authority, where it is not a question merely of excess of authority, full knowledge of the facts and unequivocal adoption after such knowledge must be proved, or, in the alternative, the circumstances of the alleged ratification must be such as to warrant the clear inference that the principal was adopting the supposed agent's act whatever they were or however culpable they were.³ Acquiescence and ratification must be founded on full knowledge of facts.⁴ Before the principal can be bound by ratification, he must be proved to have had full knowledge or at any rate means of knowledge of all the essential facts of the transaction into which his agent had entered on his behalf.⁵ There can be no ratification of an invalid transaction where the person performing the supposed act of ratification has been kept by the conduct of the party in whose favour it was made unaware of the invalidity of the first transaction and had not at the time of the supposed ratification the means of forming an independent judgment.⁶ Where on a direction by the principal to his agents to purchase grain for him, the agents sold to him their own grain at a price higher than the prevailing market rate, the principal was entitled to repudiate the transaction and could not be alleged to have ratified it in the absence of knowledge that the agents were selling their own property and were charging him in excess of the market rate.⁷ So, where a firm was employed to invest money in 'other Chetti firms', but they employed a part of the money in their own business and furnished accounts from time to time of their dealings with the money showing its actual disposal, but the accounts were very obscure and no attempt was made to explain to the principal what his agents were doing or why they had so deviated from their original instructions, *held*, there was no full knowledge of facts and it was also at least doubtful whether what the agents did could be regarded as acts done on behalf of the principal, and therefore the doctrine of ratification could not apply.⁸

An agent wrongfully distrains certain goods without the authority of the principal, and pays over the proceeds to the principal. The principal is not deemed to have ratified the

1. Bowstead, Art. 38, pp. 48, 49.

2. *Lynch v. Smyth*, 25 Colo. 103.

3. *Surendra v. Kedar*, 1936 Cal. 87=161 I.C. 224; *Mursh v. Joseph* (1897) 1 Ch.213.

4. *Jagmohandas v. Pallonjif*, 22 Bom. 1, 13; *Gauri Shankar v. Jawala Pershad*, 1930 Oudh 312=7 O. W. N. 426.

5. *Katiani v. Port Canning & Land Improv. Co.*, 19 C. W. N. 56.

6. *Surer v. King*, (1853-56) 10 E. R. 1046; *Raja Mohan v. Nisar*, 12 Luck 435=1937 Oudh 87=164 I. C. 945.

7. *Danodur v. Sheenram*, 29 All. 730.

8. *Murugappa v. Off. Ass. Madras*, 42 C. W. N. 8, P. C.

wrongful distress by receiving the proceeds, unless he received them with a full knowledge of the irregularity, or intended, without inquiry to take the risk upon himself.¹ So, a principal will not be deemed to ratify a voidable transaction unless he knows that it is voidable.²

An agent, with authority to distrain for rent, wrongfully seized and sold a fixture, and paid the proceeds to the principal who received them without notice of the illegality. Held, that the principal had not ratified the trespass.³

An agent, without authority, signed a distress warrant, and after the distress, informed his principal, who said, that he should leave the matter in the agent's hands. Held, that that was a ratification of the whole transaction, though there had been irregularities in levying the distress of which the principal had no knowledge.⁴

An agent entered into an agreement on behalf of his principal. A letter from the principal, saying that he did not know what the agent had agreed to, but that he must support him in all he had done, was held to be a sufficient ratification of the agreement, whatever it might be.⁵

An agent purchased a chattel on his principal's behalf from a person who had no right to sell it, and the principal ratified the purchase. Held, that the principal was guilty of a conversion of the chattel, though he had no knowledge at the time of the ratification that sale was unlawful. Here, the circumstances rendering the transaction a conversion were collateral to and did not form part of the contract ratified.⁶

In *Grishchandra Das v. Gillander, Arbuthnot & Co.*,⁷ the plaintiff let to A who had been employed by the defendants, a cargo boat to land certain goods and during the landing of the goods a dispute as to the terms of hiring arose, and on A refusing to pay what was alleged by the plaintiff to be due to him for the hire of the boat, the plaintiff refused to give up certain bales then remaining unlanded from his boat. A thereupon communicated the circumstances to an assistant in the defendant's firm, who afterwards went to A and forcibly took the goods from the plaintiff's boat without satisfying the plaintiff's lien thereon, and the defendant's firm received them into their godowns. It was proved that A and the assistant acted without the knowledge or authority of the defendants, and that the defendants received the goods without any knowledge of how they had been obtained except so far as letters written by the plaintiff's attorney to them may have conveyed knowledge of the fact that the plaintiff claimed a lien on the goods, such letter giving no

1. *Lewis v. Read* (1845) 14 L. J. Ex. 295=13 M. & W. 834.

2. See *Spackman v. Evans* (1868), L. R. 3 H. L. 171; *Savery v. King*, *supra*.

3. *Freeman v. Rosker*, (1849), 13 Q. B. 780; *Becker v. Riebold* (1913), 30 T. L. R. 142.

4. *Haselar v. Lemoyne* (1858), 28 L. J. C. P. 103.

5. *Fitzmaurice v. Bayley*, (1856), 26 L. J. Q. B. 114=6 El. & Bl. 858.

6. *Hilberry v. Hatton*, (1864), 2 H. & C. 822.

7. 2 B. L. R. O. C. 140.

information as to the circumstances under which the goods had been taken, Peacock C. J., held that in the absence of such knowledge on their part, the receipt of the goods by them did not amount to a ratification of the wrongful act of their assistant and A so as to render them liable in an action by the plaintiff for damages. On the question of the effect of the receipt of the goods, Peacock C. J., said: "The letter (written by the plaintiff's attorney to the defendants demanding the return of the goods) did not state or inform them of the circumstances under which the goods had been taken out of the plaintiff's possession, but merely tells that Messrs Judge and Heckle who were the plaintiff's attorneys, had been consulted with reference to the defendants having trespassed on his cargo boat and taken forcible and wrongful possession of the goods. . . . The defendants knew that they had not committed any trespass on the plaintiff's cargo-boat; and this letter gave them no such knowledge or notice of the circumstances as rendered their subsequent receipt of the goods a ratification of the trespass. It might have put them to an inquiry as to the circumstances under which the goods had been taken; but they were not bound to make that inquiry, and the fact of their not inquiring could not convert their subsequent receipt of the goods without knowledge of the real state of the facts, into a ratification of what they did not know".

Where a landlord directed a bailiff to distrain for rent, giving directions to the bailiffs to take goods only on the demised premises, and the bailiffs took some cattle belonging to the persons outside the demised premises; and the bailiff after sale made over the whole sale proceeds to the landlord, Parke J., held that the act of the landlord in directing the sale of the cattle and receiving the proceeds was a sufficient ratification of the acts of the bailiffs in making the distress as to such of the cattle as were taken on the demised premises, because the taking of them was within the original authority given; but that as to the others taken outside the demised premises, the landlord could not be liable, *unless he ratified the acts of the bailiffs with knowledge* that they took the cattle elsewhere than on the demised premises, or unless he meant to take upon himself, without inquiry, the risk of any irregularity which they might have committed and to adopt their acts.¹

Both acquiescence and ratification must be founded on a full knowledge of the facts, and further, it must be in relation to a transaction to which effect may be given thereby; therefore where the accounts of a bank in liquidation had been changed so as to represent the bank as a debtor in respect of a sum which had been borrowed by its manager for its own purposes; held, that the doctrine of acquiescence and ratification by the liquidating authorities would not avail to render the bank liable to pay a debt which it never owed.²

1. *Lewis v. Read*, 13 M. & W. 834. See also *Smith v. Cologan*, 2 T. R. 189 (note) and *Kallmohan Roy Choudhry v. Ramjoy Mundal*, 6 Hay, 289.

2. *La Banque Jacques Cartier v. La Banque D' Epargne de la cite du Montreal*, L. R. 13 App. Cas. 111.

An act done by an agent in excess of his authority may also be ratified.¹ But "there is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future." Therefore the ratification by a company of certain acts done by its directors in excess of the authority does not extend the authority of the directors so as to authorise them to do similar acts in future.²

The requirement of knowledge of the material facts is just as important in tort cases as in those based on contracts.³ It is not possible to lay down any hard and fast rule by which it can in all cases be determined what facts are material. But generally speaking in the case of contracts, the parties, the consideration, the subject-matter, the time, the terms, the conditions, the obligations assumed, the risks incurred, the rights waived or surrendered—all these would ordinarily be regarded as material; while in the case of torts, the time, the place, the persons affected, the nature of the acts, done the extent of the injury—all these would seem material ordinarily.⁴

It is to be noted that it is ordinarily actual knowledge and not mere opportunity for acquiring knowledge which is demanded here. "Knowledge—not the existence of circumstances which would by the exercise of the case, result in knowledge—is essential to the ratification of an act." The principal, where nothing has occurred to put him on his guard, is not bound to distrust his agent. He has the right to assume that the agent will not exceed his authority or practise fraud, or commit crime; and he is obliged, before accepting the benefit of an authorised act, to inquire whether in performing it, the agent has not in some way violated his trust. Mere careless ignorance, or mere negligence in not discovering the departure from authority when there is nothing to suggest it, is not enough. Nor can the principal be charged with a constructive notice as, for example, he is not obliged to search the public records to discover his agent's defaults or unauthorised acts. But at the same time he cannot be justified in wilfully closing his eyes to knowledge. He cannot remain ignorant where he can do so only through intentional obtuseness. He cannot refuse to follow leads, where his failure to do so can only be explained upon the theory that he preferred not to know what on investigation would have disclosed. He cannot shut his eyes where he knows that irregularities have occurred. In such a case, he will either be charged with knowledge or with a voluntary ratification with all the knowledge which he cared to have.⁵

Besides this, the facts in certain cases may be so patent that for the principal to profess ignorance would merely be to stultify himself. They may be so obvious that the principal, as a reason-

1. *Secretary of State v. Kamachee Boys*, (1859) 7 M. I. A. 476.

2. *Irvine v. Union Bank of Australia*, (1877) 2 App. Cas. 356, at p. 375=4 I. A. 86. See also *Pratt (Bombay), Ltd., v. E. D. Sassoon & Co.*, (1935) 60 Bom. 326=161 I. C. 126, affirmed in A. I. R. 1938 P. C. 159=174 I. C. 545.

3. *Steinman v. Baltimore Laundry Co.*, 109 Md. 62.

4. See *Katlar*, p. 301. Mechem, §. 397.

5. See *Katlar*, pp. 301 and 302 and the authorities cited therein.

able man, cannot be heard to say that he was ignorant of them. Also, the duty to know them may be so interwoven with the proper conduct of his business, that he must, as an ordinary businessman, be presumed to know them. Actual knowledge, like any other fact, may also be inferred from the proof of knowledge of certain other facts or from the knowledge of some agent other than the one ratification of whose act or contract is in question, but not from the knowledge of such agent himself.¹

Where such agent is a mere volunteer and not the agent of the principal for any purpose, it is the duty of the principal or the person who becomes so by adopting the contract made in his name and for him to make all needed inquiry and investigation into facts, acts and representations of the person, who without authority has assumed to act for him, before he adopts the contract as his own.² Certainly if he makes no inquiry, but blindly accepts the proceeds as his own, there is strong evidence that he has voluntarily ratified having all the knowledge which he cared to have.³ This rule also applies to the case where the principal of an agent having certain authority is advised that the agent has acted in excess of it, and accepts the benefit of such excess but pleads ignorance of its nature and extent.⁴ Effect of want of knowledge on ratification is to defeat the entire ratification and not to make it good as to all matters except that as to which there was no knowledge.⁵

The English law on the subject is thus summarised by Bowstead:⁶

"Ratification can only take place in accordance with and subject to the following rules and qualifications:—

Circumstances in which and within what time ratification can take place.

(1) Where it is essential to the validity of an act that it should be ratified within a certain time, the act cannot be ratified after the expiration of that time, to the prejudice of any third person.

(2) Where an act, not being a contract, would, if it had been previously authorised, have imposed a duty on any third person the ratification of the act cannot, of itself, impose such duty on such third person, or render him liable as for non-performance or breach thereof.

(3) Where an act is done which, if not previously authorised nor subsequently ratified by the person on whose behalf it is done, would be a wrongful act on the part of the person doing it, the person on whose behalf it is done, in order by ratification to justify it, must ratify it at a time when he might lawfully do it himself; but the fact that before the ratification

1. Katlar, pp. 302, 303. See also Mechem, §§. 405, 406.

2. *Beach v. Wilcox*, 82 Mich. 636; *State Bank v. Kelly*, 109 Iowa, 544, *Wilder v. Beede*, 119 Cal. 646.

3. *Mechem v. Furresster*, 52 N. Y. 277; *Eadie Ashbaugh*, 44 Iowa 519; *Deering & Co. v. Grundy Nat. Bank*, 81 Iowa 422; *Pape v. Armsby Co.*, 111 Cal. 159.

4. *Neimeyer Lumber Co. v. Moore*, 55 Ark. 240; *Phillips v. Phillips*, 127 Pac. 346.

5. See Mechem, §. 409.

6. Article 29, p. 45, and the authorities cited therein.

an action for the wrong has been commenced against the person doing the act does not affect the validity of the ratification.

(4) A payment cannot be ratified after the money paid has been returned to the person who paid it ; but the mere fact that the person on whose behalf a payment is made, at first repudiates it, does not prevent him from subsequently ratifying it.

(5) The ratification of a contract must take place within a reasonable time after the contract is made, and before the time, if any, fixed for the commencement of the performance thereof by the other contracting party, in order to render it binding upon him. But the mere fact that the person on whose behalf a contract is made refuses, at first, to recognize it, or that the other contracting party repudiates it, does not, of itself, affect the validity of a subsequent ratification.

A contract of marine, but not of fire, insurance may be effectively ratified by the owner of the property insured, after the loss of the property, even if he has notice of the loss at the time of the ratification

Where an offer is made to an agent, and is accepted by him without authority, the circumstances that the person who made the offer gives notice to the principal of the withdrawal thereof, does not, of itself, prevent the principal from subsequently ratifying the acceptance and thereby making the contract binding on the person who made the offer.

Where an agent accepts an offer, expressly subject to ratification, the offer may be withdrawn at any time before ratification.

Time for
ratification.

As to the time within which ratification may take place, the rule thus is that it must be either within a time fixed by the nature of the particular case, or within a reasonable time, after which an act cannot be ratified to the prejudice of a third person. Where A, without the authority of the landlord, gives a tenant notice to quit, the notice cannot be made binding on the tenant by the landlord's ratification after the time for giving notice has expired.¹

The payment of a debt to a creditor of another cannot be ratified after the money has been returned to the unauthorised agent. Thus, where A without B's authority, pays a debt owing by B, and the creditor, upon discovering that A was not authorised to pay the debt, returns the money to him. B cannot subsequently ratify, or take advantage of the payment.²

In *Bird v. Brown*,³ the agent of a consignor of goods, without the authority of his principal, gave notice of stoppage *in transitu* on the principal's behalf. The goods afterwards arrived at their destination, and were formally demanded by the trustee in bankruptcy of the consignee. It was held that the consignor could not subsequently ratify the stoppage *in transitu* and so

1. *Deo d Mann v Walter* (1830), 10 B. & C 826; *Doe d. Lyster v. Goldwin* (1841), 2 Q B 143. The earlier case of *Goodtitle v Woodward* (1819) 3 B & A 689, must to this extent be considered overruled.
2. *Walter v James* (1871), L R 6 Ex. 124=24 L J Ex. 104.
3. (1850), 4 Ex. 786=80 R. R. 775.^a

divest the property in the goods, which had in the meantime vested in the consignee's trustee in bankruptcy.

It is agreed between A and B, who are partners, that on the death of either of them the survivor shall have the option of purchasing the share of the deceased upon giving notice to his executors within three months after the death. A dies, and within three months after his death, C, on B's behalf, but without his authority, gives notice to the executors of B's intention to exercise the option. Such notice cannot be ratified after the expiration of the three months so as to bind the executors.¹

The entry of an unauthorized agent upon lands barred by fine and proclamation, could not be ratified after the time for entry had elapsed.²

An unauthorized demand of a debt by the creditor's agent cannot, after tender by the debtor, be ratified so as to defeat the plea of tender, unless the agent had implied authority to receive the debt and give a discharge. A, being indebted to B, tenders the amount of the debt. Subsequently, C demands the debt in B's name and on his behalf, but without his authority. B cannot ratify the demand so as to defeat A's plea of tender.³

An unauthorized demand of goods cannot be ratified by the owner so as to enable him to sue. A has possession of goods belonging to B. C demands the goods on B's behalf, but without his authority B cannot ratify the demand so as to entitle him to maintain an action against A for conversion of the goods.⁴

The owner of a ship pledges a policy of insurance thereon. The pledgee, without the authority of the owner, gives notice of abandonment to the underwriters. The owner cannot ratify the notice of abandonment so as to render the underwriters liable as for a constructive total loss.⁵ But by an anomalous rule limited to marine insurance a contract of marine insurance made by an agent on the principal's property may be ratified by the principal after notice of loss.⁶

An agent, after the death of his principal, distrained in the principal's name for rent due. Held, that the executor might ratify the distress, and so justify the agent, although an action was at the time of the ratification pending against the agent for the trespass, and although the distress was levied before probate.⁷ So, where an agent after his principal's death, sold the principal's property professedly on behalf of the estate, it was held that the person who was subsequently granted letters of administration

Other
circum-
stances.

1. *Dibbins v. Dibbins*, (1896) 2 Ch. 348=65 L. J. Ch. 724. See also *Morrell v. Studd and Millington*, (1913) 2 Ch. 648.
2. *Lord Audley v. Pollard*, (1597), Cro. (Eliz). 561.
3. *Coles v. Bell*, (1808), 1 Camp. 478, n; *Coore v. Callinoway* (1794), 1 Esp. 115.
4. *Solomons v. Davies* (1794), 1 Esp. 83.
5. *Jardine v. Leathley* (1863), 32 L. J. Q. B. 132=3 B. & S. 700.
6. *Cory v. Patton* (1874), L. R. 9 Q. B. 577; *Williams v. North China Insurance Co.*, (1876), 1 C. P. D. 757, C. A.; *Grover and Grover Ltd., v. Matheson* (1910) 2 K. B. 401.
7. *Whitehead v. Taylor*, (1839), 10 A. & E. 210.

might ratify the sale and recover the price.¹ The title of an executor arises at, and the title of an administrator relates back to, the time of the death of the deceased.

A made an offer to B, the managing director of a company, and it was accepted by him on the company's behalf. B had no authority to accept the offer. A then gave the company notice that he withdrew his offer, and the company subsequently ratified B's unauthorized acceptance. Held, by the Court of Appeal, that the maxim "*omnis ratihabitio retrotrahitur et mandato priori acquiparatur*" applied, and that the ratification dated back to the time of the acceptance, rendering the withdrawal of the offer inoperative. Specific performance decreed against A.

45. Who can ratify.

As already noticed,³ one of the essential conditions for ratification is that the principle must be capable of contracting or doing the act himself. If a person is not competent to do the act himself, he is not competent to employ an agent to do it and a *fortiori* he is not competent to ratify that which he could not directly authorise.⁴ For instance, a corporation has no power to employ agents to do acts which are not within its corporate powers. It, therefore, cannot ratify such acts when done on its behalf and for it by a person assuming to act as its agent.⁵ But where the act is within its corporate powers or such as it can lawfully authorise to do in the first instance its unauthorised performance in its behalf may as well be ratified in the same manner and with the same effect as by an individual.⁶

On the same ground an infant⁷ or insane person⁸ or a person under duress⁹ cannot ratify. A married woman cannot ratify acts which she cannot employ an agent for.¹⁰ An executor or administrator of the estate of a deceased person cannot ratify

1. *Foster v. Bates* (1849), 12 M. & W. 226=13 L. J. Ex. 104.

2. *Bolton Partners v. Lambers* (1888), 41 Ch. D. 295; *Re Portuguese Copper mines, Ltd., Ex p. Radman, Et p. Bosanquet* (1899), 45 Ch. D. 16; *Re Tiedemann* (1899), 2 Q. B. 66. These cases are of doubtful authority, the Judicial Committee of the Privy Council having, in *Fleming v. Bank of New Zealand*, (1900), A. C. 577, at p. 587 reserved liberty to reconsider them. See Bowstead, p. 48, f n (h).

3. See notes on page 245.

4. See also *Mechem*, § 365.

5. *Ashbury Carriage Co., v. Riche*, L. R. 7 H.L. 653.

6. See *Mechem*, §§ 366—368 and the case cited therein.

7. According to the provisions of the Indian Contract Act, a contract by a minor is void *ab initio* (*Mohini Bibi v. Dharam Das*, 30 Cal. 539 P. C.), and he cannot employ an agent (S. 183). Hence a contract entered into on behalf of a minor other than for necessities will not bind the minor, nor can a minor after coming of full age ratify any contract made on his behalf during minority, even if there is a new consideration for it (*Smiths v. King* (1892) 2 Q. B. 543 cited at p. ante). The rule is codified in England (Infants Relief Act, 1874, §§ 1 & 2). Some cases which on the analogy of the English Common Law where a contract by a minor is only voidable and not void hold a contrary view, are not good law in India and therefore they have not been noted here. See also *Katjar*, p. 327.

8. *Wilke v. Wackershauser*, 143 Iowa 107.

9. *Henry v. State Bank*, 181 Iowa 97. *McFarland v. Heim*, 127 Mo. 327; *Rawling v. Neal*, 126 N. C. 271.

10. See *Katjar*, p. 327 and the authorities cited therein.

acts done during the lifetime of the deceased. But where acts have been done for the deceased or his estate which the representative might have authorized and which the executor or administrator deems beneficial to the estate, he may ratify and enforce them. Of course where the executor or administrator has power to bind the estate by his own acts, he can employ an agent to do those acts and can, therefore, ratify them when done for the estate without his previous authority.¹

An agent cannot ratify his own unauthorised act² nor can one of two joint agents ratify the act of his co-agent,³ but where the act, which when done by one agent was unauthorised, is within the general power of another agent of the same principal, the doing of the act by the first agent may be ratified by the second.⁴ Ratification by an agent depends upon certain facts which must affirmatively be made to appear. The agent ratifying must have had general power to do himself the act which he ratified. They must both be agents of the same principal and the agent whose act is in question must have professed to act as agent of the common principal.⁵ This doctrine is frequently applied to the ratification of the acts of subordinate agents by the superior agents of corporations.⁶ An agent who has the power to appoint a sub-agent and give him authority may ratify such acts of the sub-agent as are within his power to delegate and thereby make them binding on his principal.⁷ So where an agent, who has not authority to employ sub-agents for his principal, has employed a sub-agent who thus thereby becomes the agent's agent and for whose acts the agent is directly responsible to the principal—act of such sub-agent done in excess of the authority given him by the agent may be ratified by the agent so as to make him liable for them to the principal.⁸

Capacity to act should be on both occasions.

Again, as already noted, the capacity to contract, or to do the act must exist on both occasions, namely, when the unauthorised act is done and when it is ratified. Incapacity on the second occasion is always fatal to the ratification while incapacity on the first occasions makes the doctrine of ratification of unauthorised acts of the agent inapplicable, although on the analogy of the doctrine it has been held in certain cases that the person for whom and on whose behalf the unauthorised act is done can adopt it as his own and thus make it valid and binding upon himself even though at the time when the act was done he was incapable of doing the act himself being either minor or insane or labouring under some other disability.⁹

46. What acts may be ratified

Every act, whether lawful or unlawful, which is capable of being done by means of an agent, except an act which is in its

1. See Katlar, p. 327 and the authorities cited therein.

2. *Penn v. Evans*, 28 La. Ann. 576.

3. See Katlar, pp. 327, 328, and the American authorities cited therein.

4. *Ironwood Store Co. v. Harrison*, 75 Mich. 197.

5. See Mechem, §. 374.

6. *Newton v. Bronson*, 13 N. Y. 587.

7. *Cowley v. Fabien*, 204 N. Y. 566.

8. See notes on p. 345. See also Mechem, §§ 370 and 371; Katlar, pp. 328, 329.

inception void, is capable of ratification by the person in whose name or on whose behalf it is done.¹ Where A on A's behalf, but without his authority, purchases from C a chattel which C has no right to sell, under such circumstances that the purchase of the chattel is a conversion and B ratifies the purchase, B is guilty of converting the chattel.²

Where an agent of a corporation assaults a man on its behalf, the corporation may render itself civilly liable for assault by satisfying it.³

A shipmaster unnecessarily, and without the authority of the owners, sells his ship. The owners may ratify the sale, which then will become valid and binding.⁴

A, a solicitor, at the request of B, the holder of a bill of exchange, sues on the bill in the name of C without C's knowledge or authority. C ratifies the action. A is entitled to recover the amount of the bill.⁵

A distrains B's goods in the name of B's landlord, but without the landlord's authority. The landlord may ratify the distraint, and it is then deemed to have been levied by his authority.⁶

Acts void
ab initio or
ultra vires
the principal.

A transaction which is void *ab initio* cannot be ratified.⁷ A signs an instrument in B's name without his authority and with intent to defraud. B cannot ratify the signature, because it is a forgery and is void in its inception.⁸ But if B, knowing of the forgery, by his conduct induces a third person to believe that the signature is his, and such third person acts on that belief to his detriment, B will be estopped from denying that it is his signature in any action between him and such third person.⁹ So, if B knowing of the forgery, delays repudiating the signature, and the third person thereby loses his right of action against the forger.¹⁰

An act which is void in its inception is not capable of ratification, because it is one which the intended principal had not the power to do. Many cases illustrate this rule, largely connected with acts done on behalf of corporation or companies which are not within the scope of their powers as limited by the special Act, charter, or memorandum of association under which they are incorporated. However desirous the members of the corporation or company may be of ratifying such an act, they cannot do so. Where the directors of a company enter

1. Bowstead, Article 27 p. 42.

2. *Hilberry v. Hatton*, (1864), 33 L. J. Ex. 190.

3. *Eastern Counties Ry. v. Broom* (1851), 6 Ex. 314.

4. *The Australia* (1859), 13 Moo. P. C. C. 132.

5. *Ancona v. Marks* (1862), 31 L. J. Ex. 163.

6. *Whitehead v. Taylor* (1839), 10 A. & E. 210.

7. See also *Mauji Ram v. Tara Singh* (1881), 3 All. 852 (not an ordinary case of agency, but the principle is the same); *Madura Municipality v. Alagirisami* (1939) Mad. 928=A. I. R. 1939 Mad. 957; *Must. Malan v. Mohan Singh*, 1935 Lah. 547.

8. *Brooke v. Hook* (1871) L. R. 6 Ex. 89; *Greenwood v. Martins Bank* (1933) A. C. 51.

9. *M'Kenzie v. British Lanen Co.*, (1881), 6 App. Cas. 82, H. L.

10. *Greenwood v. Martins Bank*, *supra*.

into a contract which is not within the scope of the memorandum of association, the contract cannot be ratified by the company, even with the assent of every shareholder, because it is *ultra vires*, and therefore void.¹ Similarly, if directors pay dividends out of capital on a balance-sheet inflated by known bad debts, such a payment cannot be ratified by the shareholders, because the powers of the company do not authorise the payment of dividends out of capital.² But an act which is beyond the powers of the directors or other agents, but within the general powers of the company, may be adopted and validly ratified by resolution of the shareholders,³ though such a ratification will not be implied merely from the fact that the shareholders have seen and passed without comment the balance-sheet or formal documents.⁴ Shareholders may, however, by acquiescence ratify such an act if they have a full knowledge of the circumstances.⁵

The illegality of an act will not of itself prevent its ratification.⁶ A trespass or assault committed by a servant is capable of being ratified by the employer,⁷ but a principal or employer is, in such a case, only liable to the extent of the acts he has ratified.⁸ An act tortious *ab initio* may be ratified, as where agents wrongfully seized possession of a stranded ship, and the principals wrote in terms of approval;⁹ but the receipt of money, the proceeds of an illegal distress, is not a sufficient ratification of the illegal acts of the agents levying the distress, unless the principal has knowledge of the illegality.¹⁰

Unlawful
acts.

There is a distinction between an endeavour to ratify a void and a voidable act; the former cannot, as we have seen, be ratified, but the latter may be. In *Huree Ram v. Jeetun Ram*¹¹ a usufructuary mortgage was granted by the agent of a minor to one Jeetun Ram, as was alleged, without authority, and subsequently the right, title and interest of the property mortgaged was put up for sale in execution of a decree obtained against the minor. Upon the auction-purchaser at the execution of sale endeavouring to take possession, Jeetun Ram set up his title under the usufructuary mortgage which had then two years to run. The Court held that the act of the agent was the act of the minor which until avoided by a distinct act on the part of the minor on his coming of age, must be considered as valid,

Voidable act
distinguished
from void
act.

1. *Ashbury Carriage Co., v. Riche* (1875), L. R. 7 H. L. 653.
2. *Re Exchange Banking Co., Pittsraff's case*, (1882) 21 Ch. D. 519, C. A.
3. *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366. The directors themselves may ratify an act done on behalf of the company if the act was within their own powers (*Wilson v. West Hartlepool Rail, and Harbour Co.*, (1865) 2 De G. J. & S. 475).
4. *Blackburn & District Benefit Building Society v. Cunliffe Brooks & Co.*, (1885) 29 Ch. D. 902, C. A.
5. *London Financial Association v. Kelk*, (1884), 26 Ch. D. 107; See also Halsbury, Vol. I (2nd Edn.) Art 398, p. 230.
6. *Hull v. Pickersgill* (1819), 1 Brod. & Bing. 282.
7. *Eastern Counties Rail Co., v. Broom* (1851), 6 Exch. 314.
8. *Haseler v. Lemayne* (1858) 5 C. B. (N. S.) 530; *Knight v. North Metropolitan Tramways Co.*, (1898), 14 T. L. R. 286.
9. *Hilbery v. Balton* (1864), 2 H. & C. 822; See also *Barns v. St. Mary, Islington, Guardians* (1911), 76 J. P. 11.
10. *Freeman v. Roshier* (1849), 13 Q. B. 780.
11. 12 W. R. 378. See also *Kebal Kristo Dass v. Ramchander Shah*, 9 W. R. 571.

but that as more than four years had elapsed since the minor attained majority, and he had not repudiated the usufructuary mortgage, it must be taken to be good; and that therefore all that the auction-purchaser was entitled to, was the reversion of the minor in the property after the usufructuary mortgage had expired.

Only act of agent or would be agent can be ratified.

It is essential to a valid ratification that what has been done should have been done by an agent on behalf of the principal or a person assuming to act for the principal's benefit. The principal cannot ratify an act done by stranger either on his own behalf or on behalf of a third party. Chief Justice Tindal, in holding that an act done by an agent, on behalf of A could not be ratified by B, took this distinction and said "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. Such was the precise distinction taken in the Year Book, 7 Henry 4. fo. 35 a, that if the bailiff took the heriot, claiming the property in himself, the subsequent agreement of the lord would not amount to a ratification of his authority as bailiff at the time; but if he took it at the time as the bailiff of the lord the subsequent ratification by the lord made him bailiff at the time. The same distinction is also laid down by Anderson C. J., in Godbolt's Reports, 1091 'if one have cause to distrain my goods, and a stranger of his own doing, without any warrant or authority given him by the other, takes my goods, not as bailiff or servant to the other, and I bring an action of trespass against him, can he excuse himself by saying that he did it as his bailiff or servant? Can he also father his misdemeanor upon another? He cannot, for once he was a trespasser, and his intent was manifest' This principle was also explained by Lord Justice Thesiger, in *Jones v Hope*.² In that case the plaintiff sued the commanding officer of a regiment and the other officers on a contract for clothing. First, a contract with the corps was set up; but the Court held there could be no such contract, as there was no such legal entity. The plaintiff then set up a contract with the colonel personally, and sued the officers as having ratified this second contract, although it was admitted that the original contract had not been made on their behalf. Lord Justice Brett held the colonel had never contracted personally, and said: "It escaped notice at this trial—notwithstanding the length of it, as it seems to me—that whichever of the two contracts was made with Colonel Durnford, the question of ratification could not arise; because if Colonel Durnford had made a contract binding himself personally that was a contract which did not assume to be made on behalf of any one of the other defendants, and therefore whatever they said or did

1. *Wilson v. Timman* (1843), 6 M. & G. 236.

2. (1886), 3 Times Rep. p. 247 and *Hauke v. Cole* (1890), 62 L. T. 658.

could not be a ratification. They could not ratify a contract which did not assume to be made on their behalf. They might have made a new contract; but the case put was that they ratified that contract. Now they could not do it." So a man cannot ratify a contract made on behalf of his wife and another person.¹

The doctrine of ratification does not apply in a criminal case, though a principal can by becoming party to them, become an accessory.² Thus, where the question was whether a prisoner who had been tried for murder, convicted, and sentenced to death, had been tried, convicted and sentenced legally inasmuch as the appointment of the Judge who tried him had not then been sanctioned by the Government of India as required by Act XXIX of 1845, Stausse C. J. said: - "It was suggested, rather than attempted to be argued seriously, that the well-known legal maxim *omnis ratihabitio retrotrahitur et mandato priori acquiparatur* applied to the present case, and that the subsequent ratification of the Act of the Governor in Council of Bombay, by the Governor-General of India in Council, validated all intervening judicial acts. No case was cited in which such a doctrine was upheld in a criminal case. There is neither principle nor authority to support the proposition, and it would be a misapprehension and misapplication of the principle involved in the above maxim, which is founded upon the relation of principal and agent, to apply it to a case like the present."³

Criminal cases.

It has been held under the English law that a person cannot ratify an act done by the sheriff in the execution of his public duty, because it is done not as his agent but by command of the Court, and being party to an interpleader issue after the sheriff has so seized goods does not any more constitute a ratification, since the seizure being done on behalf of another (the Court) cannot be ratified.⁴

An unauthorised act founded on tort may be the subject of ratification, but a ratification of a tort will not free the agent from responsibility to third parties.⁵

Torts may be ratified.

Acts done by public servants in the name of the Crown, or the Government of India, may be ratified by subsequent approval in much the same way as private transactions.⁶ In these cases the effect may not be to create legal duties but, where the acts in question are of the kind known as "acts of State," to preclude courts of law from entertaining any claim founded upon them.⁷ Such acts are political, and outside the

Agents of Government.

1. See also *Saunderson v. Griffiths* (1926), 5 B. & C., 909.

2. See Wright's 'Principal and Agent,' 2nd Edn., p. 72.

3. *Reg. v. Rama Gopal*, 1 Bom. H. C. 107.

4. *Woollen v. Wright* (1862) 1 H. & C. 554.

5. *Rai Kishan Chand v. Sheobaran*, 7 All. H. C. 121; *Kallymohun Raitchordhry v. Ramjoy Mundul*, 2 Hay, 289; *Stephen v. Ebeall*, 4 M. & S. 259; *Abdoola bin Shaik Ally v. Stephen* 2nd Ind. Jur. O. S. 17; *Rani Shamasundari Devi v. Dukhu Mandal*, 2 B. L. R. (A. C. J.) 227; *Girish Chunder Dass v. Gollanders Arbuthnot & Co.*, 2 B. L. R. (A.C.J.) 140.

6. *Secretary of State v. Kamachee Boye*, (1859) 7 M. L. A. 478; *Collector of Masulipatam v. Cavalry Vencata*, (1860) 8 M.L.A. 529, 554.

7. *Buron v. Denman* (1847) 2 Ex. 167=76 R. B. 554.

scope of municipal law, and cannot, in ordinary circumstances, occur within the jurisdiction.¹

Ratification must be of the whole transaction and not of part: effect of partial ratification.

A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part. (*S. 199, Indian Contract Act, 1872*).

The principal can only ratify the contract or the act of the agent wholly, and not in part, and he cannot adopt part and repudiate the rest. "If you adopt a man as your agent on your behalf you must adopt him throughout and take his agency *cum onere*"² In *Bristowe v. Whitmore*,³ the master of a ship without authority entered into a charter-party by which he was put to expense. The plaintiff wished to reap the profits of the charter-party without paying these expenses. Lord Cranworth, in giving judgment, said, "The principle which must, I think, govern this case is one of universal application, namely, that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burthen. The contract must be performed in its entirety. Here the appellant, as agent for the owner, now represented by the respondents, stipulated for certain benefits in consideration of certain burthens which he undertook to bear and certain labours which he undertook to perform. If he had authority to enter into such a contract, the principal is of course bound. If he had not authority, then the principal may repudiate the contract; but he cannot take that part of it which is beneficial to him without performing that which is onerous",

Ratification of one of a series of acts constituting one transaction operates as a ratification of the entire transaction.⁴ *Qui sentit commodum sentire debet et onus*: he who derives the advantage ought to sustain the burthen. Hence the principal cannot ratify that part which is beneficial to himself, and reject the remainder; he must take the benefit to be derived from the transaction *cum onere*.⁵ Hence whatever his previous authority to the agent, whatever his innocence, the principal must adopt the whole contract including the statements and representations which induced it or repudiate it altogether.⁶ The principal cannot, on his own authority, ratify a transaction in part and repudiate it as to rest, and hence the general rule is deduced that where a ratification is established as to part, it operates as a

1. See Pollock and Mulla's Indian Contract Act, 7th Edn p 555

2. *Per Lord Ellenborough in Horil v Pack*, (1806), 7 East, 164; See also *Union Bank of Australia v. Mc Clintock* (1922) A.C. 240, P.C.

3. (1861) 9 H. & L. 391.

4. *Radnell v. Eden* (1859), 1 E. & F. 542. Cf., however, *Harrisons and Crossfield Ltd. v. London and North Western Rail Co.*, (1917), 2 K. B. 755, where carriers who had prosecuted for larceny a servant who had by a false pretence obtained goods and disposed of them, laying the property in the goods in themselves, were held to have ratified only a bare bailment and not possession of the goods for purposes of carriage.

5. *Broom's Legal Maxim*, pp. 553, 554; See also *Godhanram v. Jaharmull*, 40 Cal. 335=17 C. W. N. 67=16 I. C. 583; *E. I. R. v. Firm Sukhdeoas*, 1942 Pat. 25=74 I. C. 431.

6. *Udell v. Atherton*, 7 H. & N. 172; ref. to in *Godhanram v. Jauharmull*, 40 Cal. 335.

confirmation of the whole of that particular transaction of the agent¹. So, if a principal adopts the act of an agent in respect of a purchase of property, he must take the property subject to the conditions which the agent has incurred it with, notwithstanding any secret arrangement between the agent and himself unknown to third parties.²

As the adoption of a part of a transaction operates as a ratification of the whole, it has been held that where the principal disposes of some of the goods purchased without his authority or against his instructions, he is deemed to have ratified the whole contract of purchase and is bound by it notwithstanding his objection that it was unauthorised.³

Where a trustee in bankruptcy accepts part of the proceeds of an unauthorised sale of the property of a bankrupt, he is deemed to have ratified the whole of the transaction of such sale.⁴

Even under this rule the approval of one unauthorized act does not necessarily carry with it the ratification of a further act following after but not inseparable consequence of the prior one. For instance, where an agent without authority had collected money for his principal and applied it to his own use, it was held that an action by the principal against the agent to recover the money, while it might operate as a ratification of his collection of it, did not necessarily amount to an approval of his retention of it.⁵ So, where an agent's power of lending money is clear, a recognition of the loan as between the principal and the borrower does not necessarily amount to a ratification of the agent's act in taking insufficient security.⁶ Similarly, a principal by suing the agent to recover moneys collected by him without authority does not ratify the agent's act of the retention of it, but on the contrary repudiates it.⁷

47. How an act may be ratified

Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

(S. 197, *Indian Contract Act, 1872*).

Ratification may be expressed or implied.

ILLUSTRATIONS.

- (a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.
- (b) A, without B's authority, lends B's money to C. Afterwards B accepts interests on the money from C. B's conduct implies a ratification of the loan.

The ratification of an act or transaction may be express or implied. A ratification will be implied whenever the conduct of the person, in whose name or on whose behalf the act or transaction is done or entered into is such as to show that he

Implied ratification.

1. Story on Agency, § 250; *Katani v. Port Canning and Land Improvement Co.*, 19 C.W.N. 56, 62. See also *Vithal Das v. Secretary of State*, 26 Bom. 410.
2. *Ishenchunder Singh v. Sham Churn*, W. R. (1864), 3.
3. *Cornwall v. Wilson*, 1 Ves. 510.
4. *Brewer v. Sparrow*, 7 B. & C. 310; *Lythgoe v. Vernon*, 29 L. J. Ex. 124.
5. *Merchem*, 8. 495; *Schanz v. Martin* 37 Misc. 492; *Knowlton v. School City*, 75 Ind. 103.
6. *Bank of St. Mary v. Calder*, 3 Strob. (S. C.) 403.
7. *Holland Coffee Co., v. Johnson*, 38 Misc. 187.

intends to adopt or recognise such act or transaction in whole or in part.¹

As an illustration of it, where a shipmaster unnecessarily, and without authority, sells his ship and the owners receive the purchase-money with a full knowledge of the circumstances under which the ship was sold, the receipt of the purchase-money is a ratification of the sale.²

A is a bankrupt. B, at the request of A's wife, purchases certain bonds with A's money, and hands them to her. The trustee in bankruptcy seizes some of the bonds as part of A's estate. The trustee in bankruptcy has ratified the act of B and thereby discharged him from liability.³

A is a bankrupt. B wrongfully sells part of A's property. The trustee in bankruptcy accepts the proceeds or part thereof or otherwise recognises B as his agent in the transaction. B is deemed to have been duly authorised by the trustee to sell the property.⁴

A employs a broker to execute a distress warrant. The broker, in executing the warrant, illegally seizes goods belonging to B. In answer to a letter from B demanding compensation A writes that his solicitor will accept service of any process B thinks proper to issue. This reply is evidence of a ratification by A of the wrongful seizure.⁵

A party to a contract which is fraudulent and voidable as against him sues on the contract. He is deemed to ratify the entire contract.⁶ But a principal is not deemed to ratify a contract merely because, after repudiating it, he enters into negotiations for a compromise with the other contracting party.⁷

A debtor whose debt has been paid without his authority pleads the payment in an action by the creditor for the debt. The plea is a sufficient ratification by the debtor of the payment.⁸

A receives the rents of certain property for many years without the authority of the owner. The owner sues A for possession, and for an account of the rents and profits. The action is a sufficient ratification to render A the agent of the owner from the commencement.⁹

A contracts to do certain specified repairs to a ship. An agent of the shipowner, whose authority is to the knowledge of A

1. Bowstead, Art 31, p. 50, and the authorities cited therein.

2. *The Bonita, The Charlotte* (1861), *Lush*, 252; *Hunder v. Parker* (1840), 7 M & W 322.

3. *Wilson v. Poulter* (1724), 2 Str 859. See also *Union Bank of Australia v. Mc Clintock* (1922) 1 A. C. 240.

4. *Bremer v. Sparrow* (1827), 7 B & C 310; *Lythgoe v. Vernon* (1860), 29 L J Ex. 164. Comp. *Valpy v. Sanders* (1848), 17 L. J. C P. 249. See also *Cornwall v. Wilson* (1750), 1 Ves. 510 cited at p. 261.

5. *Carter v. St. Mary Abbott's Vestry*, (1900), 64 J. P. 548, C. A.

6. *Ferguson v. Carrington*, (1829), 9 B. & C. 59.

7. *Barrett v. Irvine*, (1907) 2 Ir. R. 462, C. A.

8. *Belshaw v. Bush* (1852), 22 L J. C. P. 24. See also *Simpson v. Eggington* (1855), 10 Ex. 845.

9. *Lyell v. Kennedy* (1889), 14 App. Cas. 437, H. L.

limited to the repairs so specified, sanctions certain variations in the work and the repairs are executed according to the contract as varied. The shipowner sells the ship as repaired. The sale is not a ratification of the unauthorized variations.¹

The acts, words or silence of the principal which are relied upon are some times spoken as in themselves a ratification but they are only the evidence of ratification rather than the ratification itself.² The methods by which an implied ratification may be effected are as numerous and as various as the complex dealings of human life.³ It is not possible to enumerate them exhaustively though certain general forms may be suggested.

Ratification being a matter of assent to or approval of the act as done on account of the person ratifying, any words or acts which show such assent or approval are ordinarily, sufficient.⁴ As for instance, where the principal, being informed of the act, agrees to it or says that he is glad it is done or says that it is alright and directs that the matter be proceeded with or declares that he will assume the unauthorized contract or agrees to pay the price stipulated for or promises to perform on his part or directs that the transaction be completed or the like,⁵ there is evidence of ratification.⁶ Where, however, the principal distinctly repudiates the contract there is no ratification though he accompanies the repudiation with the offer of a different contract,⁷ or subsequently voluntarily does something to mitigate the loss to the other party.⁸ Thus, where the principal, when he was informed of the unauthorized contract, advised the other party that it was unauthorized and warned him not to proceed, but the other party nevertheless continued and the principal later on offered to pay the other party what he thought as a fair measure of any benefit conferred on him, it was held that this offer by the principal did not amount to the ratification of the whole contract.

By a declaration or expression of approval.

Another method of ratification is by voluntarily recognizing the act or contract as binding and proceeding, with knowledge of the facts, to perform the obligations which it imposes. Thus, where the alleged principal voluntarily executes and delivers the deeds called for by an unauthorized contract of sale of land or delivers goods in pursuance of an unauthorized contract of their sale or makes partial payment upon an unauthorized contract or otherwise proceeds to act upon and perform

By proceeding to perform the obligations arising thereunder.

1. *Forman v. The Liddesdale*, (1900) A. C. 190.

2. *Mechem*, §. 430.

3. *Mechem*, §. 431.

4. *Mechem*, §. 432.

5. For instance, by negotiation of the sale of an unauthorized mortgage as in *Iowa State National Bank v. Taylor*, 98 Iowa 631; or by endorsing a note executed without authority as in *Washington Times Co. v. Wilder*, 12 App. D. C. 62 and *Mitchell v. Fennell*, 101 Cal. 614, or by giving a blank cheque with which to pay for the goods bought as in *Brown v. Reiman*, 48 App. Div. (N. Y.) 295.

6. See *Katuar*, pp. 307, 308, and the authorities cited therein. Where the man who promises is not the one for whom the agent purported to act, there is no ratification. *Roby v. Cossitt*, 78 Ill. 638. See also *Huselar v. Lemoyne* (1859), 28 L. J. C. P. 103.

7. *Hardwick v. Kirwan*, 91 Md. 285.

8. *Findlay v. Hildenbrand*, 17 Idaho 403.

it, there is a strong evidence of ratification.¹ So a principal who puts the tenant into possession and receives rent under an unauthorised lease, ratifies it by doing so.² Where one left in charge of a repair shop but without authority took in a bicycle to be repaired and shipped to the owner, and the proprietor of the shop repaired the bicycle, he ratifies the contract and is bound by the agreement to ship it as directed.³

By the
acceptance
of the
benefits
arising
thereunder.

It is a general rule of constant application in the law of agency, that he who voluntarily and with knowledge of the facts accepts the benefit of an act purporting to have been done on his account, by his agent, thereby ratifies it and makes it his own as though he had authorised it in the beginning.⁴ It is a rule of quite universal application that he who would avail himself of the advantage arising from the act of another in his behalf must also assume the responsibilities which it may impose or entail. Where the principal has enjoyed the fruits of an unauthorised act of an agent done in his behalf, he will not be afterwards heard to say that it was unauthorised. He cannot take the benefit and reject the burdens but must either accept them or reject them as a whole.⁵ One, therefore, who voluntarily accepts the whole or any part of the proceeds of an act done by one assuming, though without authority, to be his agent, must ordinarily be deemed to ratify the act and take it as his own with all the burdens as well as all the benefits.⁶

The rule, however, like other general rules, should be received with caution and should be applied with discrimination, for there may be cases where acceptance of benefit might have been due to some mistake of fact, or benefits might have been thrust upon the principal to be afterwards made the basis of a liability.⁷ Thus, it has been held that a principal does not ratify the unauthorised act of his agent by accepting the proceeds or fruits thereof, if knowledge of it did not come to him in time to enable him to repudiate the entire transaction without substantial injury. If when he acquires knowledge, he cannot in justice to himself disavow the whole of his agent's contract, he is entitled to stand upon what he authorised, and repudiate the rest.⁸ But in such cases where receipt of proceeds is due to some mistake of fact, the principal, if he repudiates the transaction on

1. *Mechem*, 8 433; *Katlar*, p. 309 and the authorities cited therein.

2. *Kristopher v. National Brew Co.*, 72 Mo. App. 121.

3. *Rollins v. Cycle Co.* 84 App. Div. (N. Y.) 287.

4. *Mechem*, 8, 434.

5. See *Katlar*, p. 310 and the numerous American authorities cited therein. See also illustration (b) to section 197 of the Indian Contract Act, 1872, cited at p. 261.

6. See the illustrations cited at p. 262.

7. See *Weatherford etc., R. Co., v. Granger*, 86 Tex. 350; *Frist Nat. Bank v. Badger Lumber Co.*, 60 Mo. App. 265.

8. *Clark v. Clark*, 59 Mo. App. 532; *Humphrey v. Havens*, 12 Minn. 298; *Dryant v. Moore* 26 Mo. 84; *Baldwin v. Burrows*, 47 N. Y. 199.

9. *Cooley v. Perrine*, 32 Am. Rep. 210. So also in the case of unauthorised repairs or additions to property of such character that they cannot be removed and restored without serious injury; *Foreman v. Liddlestate*, 1909 App. Cas. 100; *Young v. Board of Education*, 54 Minn. 385; *Mills v. Berta*, 23 S. W. 910. So also where the property cannot be distinguished. *Schutz v. Jordan* 82 Fed. 55; *Pratt v. Bryant*, 20 Vt. 333.

acquiring knowledge of such fact, he must restore or offer to restore the benefit he has received within reasonable time; for intention of such benefit after acquisition of such knowledge is itself a cogent evidence of ratification.¹ In such cases where restoration of the benefit is not possible without substantial injury² or where what has been received has been disposed of³ or has been consumed in the expected way before notice of the act or where what was received was only personal service accepted before notice,⁴ retention of such benefit is no evidence of ratification, and any recovery or restoration of such benefit must be claimed only upon a quasi-contractual basis.⁵ Where restoration is possible it must be made at the place where the proceeds were received.⁶ Where, however, the principal attempts to restore and tenders back part of what was received and is met with an unconditional refusal to accept a disaffirmance the fact that the residue was not tendered, does not defeat the principal's right.⁷

It has been observed that acceptance and receipt in order to take effect as evidence of ratification must fulfil the following conditions:—

- (a) It must be by the principal himself or by some person other than the assumed agent on his behalf and with his express or implied authority.
- (b) It must be with full knowledge of the fact that it forms proceeds of an unauthorised contract which stands in need of ratification to be binding on the principal.
- (c) It must be voluntary and not forced upon the principal by the emergencies of a particular situation.
- (d) It must be made in confirmation of the contract needing ratification and not in any other actual or supposed right.⁸

Where the proceeds were never intended to come into the hands of the principal but of some third party as where the principal was without authority joined as a known accommodation worker in a note and the proceeds went to the principal debtor on the note,⁹ or where they were received by the very agent who did the unauthorised act,¹⁰ it is not enough unless they stop there with the knowledge and acquiescence of the principal.¹¹ Where such proceeds consist of currency only it is all the more necessary that they must have been received by the principal as

1. See Katlar, p. 312, and the authorities cited therein. See also *Mc Dermott v. Jackson*, 97 Wis. 54 which also lays down that the principal is, in such cases always entitled to a reasonable time to determine his course; and *Mechem*, §§. 434—436.

2. *Clark v. Clark*, supra.

3. *Martin v. Hickman*, 64 Ark. 217; *Baldwin v. Burrows*, 47 N. Y. 199.

4. *Swayne v. Union Mut. L. Ins. Co.*, 49 S. W. 518.

5. See Katlar, p. 313.

6. *National Improvement Co., v. Maicken*, 103 Iowa 118.

7. *Bromley v. Aday* 70 Ark. 331.

8. See Katlar. pp. 313, 314.

9. *Gulick v. Grover*, 79 Am. Dec. 725.

10. *Railroad Nat. Bank v. City of Lowell*, 109 Mass. 214.

11. *Mechem*, §. 437.

proceeds of some act of agency and not in some other distinct capacity in which the principal would have the right to receive and retain them.¹ For instance, where an agent, who is indebted to the principal, brings money to him and pays it, the principal receiving it in good faith is not bound to restore it when later on he learns that it was the proceeds of some unauthorised act which the agent has assumed to do upon the principal's account. Money in such cases is not impressed with any trust and cannot be followed in the principal's hand as the property of the party concerned when the principal seeks to repudiate the unauthorised transaction of which it forms the proceeds.² But if the principal can be charged with knowledge of the actual facts at the time he received the money that it did not belong to the agent but was the proceeds of an unauthorised act done on his behalf, the nature of which was not then known to him, the money is impressed with an equitable trust which he must fulfil by refunding it if he repudiates the act of the agent on becoming aware of the nature of the transaction.³ So if an agent obtains money, with which he pays his debt to his principal, by disposing of his principal's property, as if it were his own, the principal before reclaiming the property is not bound to restore the money so paid to him.⁴

So also the mere receipt and retention of the benefits of an unauthorised act does not amount to the ratification of such act unless it is accompanied with full knowledge of the facts or at least such knowledge as the principal cared to have.⁵

It is also to be noted that the acts of receipt and retention should both be voluntary, i. e., the principal must have a choice to do so or not as he liked. Where there is no such choice or where the benefits cannot be separated from something to which he is in any event entitled or where the contract though actually unauthorised is so much within the apparent authority of the agent, that he is obliged, so far as third persons are concerned, to carry it out or where he makes such receipt or retention only to avoid loss, or to make the loss as small as possible and not to benefit himself, there is no ratification and the agent at least is not released from liability to the principal for such unauthorised act by such receipt and retention.⁶ Where an agent for the collection and transmission of a sum of money, who was given specific instructions by his principal to remit it by express, purchased a cheque drawn by parties then in good standing and credit in New York for collection but before it was so forwarded the drawers had become insolvent and the cheque was dishonoured, it was held that the agent having violated the instructions as regards the mode of sending the money, was liable to the principal for the loss sustained by him as that the sending of the cheque to

1. *Thacker v. Pray*, 117 Mass. 291; *Sanborn v. First Nat. Bank*, 115 Mo. App. 50; *Cass v. Hammond Packing Co.*, 105 Mo. App. 168.

2. *Ibid.* See also *Wycoff v. Davis*, 127 Iowa 399.

3. *Russ v. Hanson*, 119 Iowa 378.

4. *Wycoff v. Davis*, *supra*.

5. See *Kahar*, p. 315, and the authorities cited therein; See also *Phosphate of Lime Co., v. Green*, L. B. 7 C. P. 43.

6. See *Katlar*, p. 315, and the American authorities cited therein. See also *Meobem*, 88. 439 and 440; and *Forman v. Liddesdale*, 1900 A. C. 190.

New York for collection in ignorance of the drawer's insolvency and when the retention of it might constitute laches brought with danger of a loss to him, was not an absolute ratification of the act of the agent so as to exonerate him from all liability.¹

The receipt and retention of benefit must also be in confirmation of the unauthorised act and not in any other capacity. Where the principal would be entitled to the same benefit independently of such unauthorised act, the receipt and retention of it would not amount to ratification.² Thus, a person who takes and retains property of his own, to the possession of which he is entitled, does not thereby ratify an unauthorised agreement of his agent in procuring such property.³

The bringing of an action based on an unauthorised act of an agent manifests unequivocally the principal's determination to abide by it, to regard it as valid and to enforce its performance. The principle underlying is that if the voluntary acceptance of the benefits of the act will ordinarily work a ratification, as it has been seen to do, a *fortiori* will the endeavour by legal process to secure those benefits to compel performance, accomplish that result.⁴

Action in a court of law.

The basing of the defence upon the act is, of course, equally within the spirit of the rule.⁵ Here also it is essential that the principal must have knowledge of the facts, but in this case it is sufficient if he has such knowledge at any time before he demands judgment of performance.⁶ A disclosure of the facts by the other party's pleadings or evidence may be enough, if sufficiently definite and certain to put the principal to an election either to repudiate or to satisfy.⁷ Where the principal on being apprised by the other party that his agent had given a warranty pleaded a set-off for the price of the warranted article, it was held a sufficient ratification of the unauthorised warranty.⁸ Knowledge of a fact is one thing; knowledge that one claims the fact to exist, and another denies it, is another. The two things may be followed by very different legal consequences. The former is sufficient for working a ratification, while the latter is not.⁹

It may be observed that in this case also if the principal chooses to ratify, he must ratify *in toto* i. e., he must take the burdens with the benefits, and by demanding performance to himself he assumes responsibility for the instrumentalities—the frauds, misrepresentations, promises and conditions through which the act was induced so far as they affect the enforceability.

1. *Walker v. Walker*, 5 Helsk, (Tann) 425. But under ordinary circumstances the unconditional acceptance of such a cheque will constitute a ratification. *Rathbun v. Citizens' Steamboat Co.*, 32 Am. Rep 321.
2. *Baldwin Fertiliser Co., v. Thompson*, 106 Ga. 480; *Crooker v. Appleton*, 21 Me. 181; *White v. Sanders*, 32 Me. 188; *Forman v. Liddesdale*, 1900 App. Cas. 190.
3. *Baldwin Fertiliser Co., v. Thompson*, *supra*.
4. Mechem, §. 446 and the authorities cited therein. See also Katlar, p. 316 and *Lyall v. Kennedy*, 14 App. Cas. 437.
5. *Belshaw v. Bush*, 22 L. J. O. P. 42; *Simpson v. Eglington*, 10 Ex. 845.
6. *Shinn v. Guyton Co.*, 109 Mo. App. 557.
7. Katlar, p. 317.
8. *Edgen v. Brook*, 172 Mass. 581.
9. *Shontager v. Peabody*, 59 Conn. 588.

ty of the contract upon which his action is founded.¹ A party to a contract which is fraudulent and voidable as against him sues on the contract. He is deemed to ratify the entire contract.² Where a seller of goods instructs his agent to sell out to the people of undoubted credit but the agent sells goods to and accepts notes from people notoriously insolvent, the principal does not lose his claim against the agent merely because he sues upon such notes and attempts to realise some thing upon them.³

It is also to be noted that such suit of defence, in order to amount to a ratification, must be based on the validity of the agent's act and not on its invalidity. In the latter case, namely, where such suit or defence is based on the invalidity of the agent's act, there is no ratification of such act.⁴

By acquiescence.

Acquiescence is said to constitute a ratification of an unauthorised Act. Acquiescence is to be distinguished from adoption of a contract by conduct generally, by the fact that it implies nothing active on the part of the principal, but consists in simply not objecting. A ratification of a contract by acquiescence is harder to prove when the act is the act of a stranger, as to whom there is no pretence of authority,⁵ than when it is the act of an agent who has only exceeded his authority.

When it is said that the principal has acquiesced and so ratified, acquiescence *before* the act must be clearly distinguished from acquiescence *after*. In the first case it may constitute an estoppel, and prevent the principal from setting up the want of authority. Acquiescence after, as between the principal and third party, has no legal effect whatsoever as between the principal and third party,⁶ though it may have as between the principal and his agent, in that it may prevent him putting things right, minimizing the damage, or doing the same thing again. L. J. Thesiger observed as follows on this point:- "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham, said,⁷ is the proper sense of the term 'acquiescence', and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than an instance of the law of estoppel by words or conduct. But when once the act is completed without any knowledge or assent upon the part of the person whose right is infringed, the matter is to be

1. Mechem, S. 446. For illustrations see *Lyall v. Kennedy*, (1889), 14 App. Cas. 437, H. L.; *Belehaw v. Hush* (1852), 22 L. J. C. P. 24; and *Barrett v. Irvine*, 2 Ir. R. 462 C. A. cited at page 262.

2. *Ferguson v. Carrington*, 9 B. & C. 59.

3. *Robinson Machine Works v. Vorne*, 52 Iowa 207.

4. Mechem, S. 499, citing *Barnedall v. O'Day*, 67 C. C. A. 278.

5. Story on Agency, Sec. 256; *Marsh v. Joseph*, (1897), 1 Ch. 213.

6. *Kent v. Thomas* (1856), 1 H. & N. 473.

7. In *the Duke of Leeds v. Earl Amherst* (1846), 2 Ph. 117, at p. 123.

determined on very different legal considerations. A right of action has then vested in him which, at all events as a general rule, cannot be divested without accord and satisfaction, or release-under seal. Mere submission to an injury for any time short of the time limited by the statute for the enforcement of the right of action cannot take away such right, although under the name of laches it may afford a ground for refusing relief under some particular circumstances; and it is clear that even an express promise by the person injured that he would take no legal proceedings could not itself constitute a bar to such proceedings, for the promise would be without consideration and therefore not binding".¹ In this case the defendant, a sub-agent for sale, had bought for himself and resold at a profit in February, 1869. The plaintiff was more or less aware of it in June, 1869, and did not take legal proceedings to force the sub-agent to account until April, 1873, and the Court of Appeal held he was not estopped from insisting upon an account.

No legal liability can result from silence alone unless one owes a duty to speak.² On the other hand it is a maxim of the law of estoppel that he who remains silent when in conscience he ought to speak will be debarred from speaking when in conscience he ought to remain silent.³ Either of these situations are distinct from ratification by acquiescence. The question in the latter case is not whether the other party in reasonable reliance upon the conduct of the principal has changed his situation to his detriment, but only whether a reasonable man may fairly infer assent from the circumstances.⁴ Where there is estoppel by acquiescence, the change of situation of the other party to his detriment prevents the principal from denying the validity of the unauthorised act or contract, which he led, by his conduct, the other party to believe to be valid, while in the case of ratification by acquiescence there is no need of change of situation it being enough if the conduct of the principal is such as to lead a reasonable man to believe that he has given his assent to such unauthorised act or contract. So the circumstances may fall short of creating an estoppel and may yet be sufficient to effect ratification.⁵ So also although silence *per se* is no evidence of ratification yet it may be accompanied by such circumstances as to lead a reasonable man to an inference that it is due to the principal consenting to the validity of the unauthorised act or contract.⁶

The above distinction, however, between ratification by acquiescence on the one hand and estoppel or mere silence on

1 *De Bussche v. Alt* (1878), 8 Ch. Div. 286, at p. 314.

As to acquiescence being a defence against an equitable claim, see *Blake v. Gale* (1883), 31 C. D. 126.

2 *Royal Ins. Co., v. Beatty*, 119 Pa. 6; *Whittemore v. Hamilton*, 51 Conn. 153; See also *Shri Rajah Kundana v. Achanta Venkata*, 52 I.C. 414 (Mad); *Sukhpal Kuar v. Dasu*, 58 I. C. 165 (o), Per contra *Ramaswami v. Karuppan*, 31 I. C. 216 (Mad.).

3 See *Meehem*, 8. 453.

4 See *Meehem*, 8. 454.

5 *Iron City Nat. Bank v. Fifth Nat. Bank*, 47 S.W. 533.

6 See *Philadelphia, etc. Co., v. Cowell*, 28 Pa. 329; *Ramaswami v. Aloyappa*, 28 I. C. 135; *Ramaswami v. Karuppan*, 31 I. C. 216.

the other is not observed in practice. "We suppose," observes Folger J., "acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorised act, and to such judicial redress after the knowledge of the committal of it, whereby innocent third parties may have been led to put themselves in a position from which they cannot be taken without loss. It is the doctrine of equitable estoppel."¹ "The rule as to what amounts to ratification of an unauthorised act," says Lyon J. "is elementary and may be safely stated thus:—Where a person assumes in good faith to act as agent for another in any given transaction, but acts without authority, whether the relation of principal and agent does or does not exist between them, the person in whose behalf the act was done, upon being fully informed thereof, must within a reasonable time disaffirm such act, at least in cases where his silence might operate to the prejudice of innocent parties, or he will be held to have ratified such unauthorised act."

The correct rule seems to be that when the principal has full knowledge of the act of his agent from which he receives a direct benefit he must dissent and give notice of his non-concurrence within a reasonable time, or his assent and ratification will be presumed. It is true that mere knowledge on the part of the principal of an agent's unauthorised action, will not make silence or noninterference in all cases amount to ratification. But it would, where the party dealing with the agent is misled or prejudiced or where the usage of trade requires or fair dealing demands a prompt reply from the principal. In all such cases if the principal is dissatisfied with the act of the agent and fully informed of what has been done, he must express his dissatisfaction within a reasonable time.³

It is to be noted that the plea of ratification by acquiescence—by silence and action—is more readily available to third parties dealing with the agent than to the agent himself, inasmuch as the agent is always in a position to know whether his act is within the authority conferred on him by the principal and cannot throw a duty on the principal to show approval or disapproval of every act, while the third parties are not in such advantageous position and are always likely to be misled to their prejudice by such silence and inaction on the part of the principal to a belief that either the agent's act is not beyond his authority or it is done with the approval of the principal.⁴

Even in the case of third parties, unless there has been a change of position creating estoppel in favour of such parties, silence and inaction has not always been held to be a conclusive evidence of ratification and the authorities are by no means agreed on this point. In *White v. Langdone*⁵ it was held:—"It is the duty of one trading with an agent who has only a

1. Per Folger, J. in *Kent v. Quicksilver Mining Co.*, 78 N. Y. 137.

2. Per Lyon J. in *Saveland v. Green*, 40 Wis. 431.

3. *Mobile & Montgomery Ry., Co., v. Jay*, 65 Ala. 113.

4. See Story, §. 258, *Triggs v. Jones*, 46 Minn. 277.

5. 30 Vt. 599.

limited and special authority, to make enquiry as to the extent of the agent's authority, if he omits enquiry he does so at his peril. It is not the duty of the principal, upon hearing of the sale of the agent (which was in this case the unauthorized act) to seek the purchaser and give him notice of his claim, and his omission to do so and his mere silence, are not ordinarily to be construed as a ratification of the sale. If special circumstances may be supposed to exist which would make it the duty of the principal to give such notice none such are proved in this case." In another case it is said, "Silence of the alleged principal when fully advised of what has been done in his behalf by one who attempts to his act as his agent without authority may be sufficient from which to infer a ratification of the unauthorized act¹ which, however, is not conclusive, except when the party affected by such silence has been misled or injured so that it does not necessarily follow that one seeking to enforce a liability by ratification arising from silence, or a failure to repudiate an unauthorized act after knowledge thereof, must also show that by such silence he has been misled to his prejudice, although it is proper to do so, as silence of the alleged principal under such circumstances may of itself be sufficient to establish a ratification of such act.² Where, however, after knowledge of the unauthorized act comes to the alleged principal, the party affected by such act has an opportunity to improve his position, the alleged principal is bound to disapprove within a reasonable time after notice of such act and a failure to do so is conclusive evidence of assent.³

The English authorities draw a distinction between a mere volunteer assuming to act as agent, and an agent exceeding his authority, and in the latter case hold that ratification may be implied from the mere silence or acquiescence of the principal.⁴ As an illustration of this, where a wife purchases goods, which are not necessaries, in the name of her husband, and the husband has control over the goods, and does not return them to the seller, he is deemed to ratify the contract, and must pay for the goods.⁵ Similarly, in *Smith v. Hull Glass Co.*,⁶ the Chairman and Deputy Chairman of directors, and the secretary, of a manufacturing company, respectively ordered goods which were necessary for the purposes of the business of the company, and the goods were supplied and used therein. Held, that though the goods were ordered without authority the directors must be taken to have known that they had been supplied and used in the business, and that therefore the company was liable for the price.

1. 13 Colo. 69.

2. See *Union M Co., v. Rocky Mt. Bank*, 2 Colo. 248 cited at p. 322 of *Katlar's Law of Agency*.

3. *Lynch v. Smyth*, 25 Colo 103; *Meyer v. Smith*, 3 Tex. Civil App. 87; *Iron city Nat. Bank v. Fifth Nat. Bank*, 47 S. W. 533; *Norden v. Duke*, 120 App. Div. 1.

4. See *Bowstead*, Article 31, p. 50.

5. *Waikman v. Wakefield*, (1807) 1 Camp. 120.

6. (1852), 21 L. J.C.P. 106. See also *Allard v. Bourne*, (1863), 15 C.B. (N.S.) 468.

This distinction, however, is not universally observed. In *Robbins v. Blanding*¹ it was said, "A failure to disavow the acts of a mere volunteer, who meddlingly assumes to act without authority as the agent of another, will not constitute a ratification. But where a person, in good faith, assumes to act as the agent of another, but without authority in fact, in any particular transaction, the latter, upon being fully informed thereof, must in cases where his silence might prejudice the assumed agent or innocent third parties, disavow the act within a reasonable time or he will be held to have ratified it. As to such third persons it would seem that the element of good faith of the assumed agent is not essential". In *Philadelphia etc., R. R. Co., v. Cowell*² Woodward J., observed: "If the party to be charged has been accustomed to contract through the agency of the individual assuming to act for him, or has entrusted property in his keeping or if he were a child or servant, partner or factor the relation *conjunctionis favor* would make silence strong evidence of assent. On the other hand, if there had been no former agency and no peculiarity whatever in the prior relations of the parties, silence—a refusal to respond to mere impertinent interferences, would be very inconclusive but not an absolutely irrelevant circumstance. The man who will not speak when he sees his interest affected by another must be content to let a jury interpret his silence. It is a clear principle of equity that where a man stands by knowingly and suffers another person to do act in his own name without any opposition or objection he is presumed to have given authority to do those acts. If mental assent may be inferred from circumstances silence may indicate it as well as words or deeds. To say that silence is no evidence of it is to say that there can be no implied ratification of an unauthorised act, or at least to tie up the possibility of ratification to the accident of prior relations. Neither reason nor authority justifies such a conclusion. A man who sees what has been done in his name and for his benefit even by an intermeddler, has the same power to ratify and confirm it that he would have to make a similar contract for himself, and if the power to ratify be conceded to him the fact of ratification must be provable by the ordinary means".

Katkar observes³ : "The true rule appears to be that silence of the principal or his abstinence from actual repudiation is always relevant in determining the issue of ratification, but it is not conclusive, its weight varying with the prior relations of the parties and the circumstances of each particular case. For instance, where silence is accompanied by conduct inconsistent with disapproval an inference of ratification becomes all the more probable than in other ordinary cases.⁴ The time within which the principal must act in order to avoid the inference of assent cannot be determined by any hard and fast rule. Although attempts have been made in some cases to declare it, as for

1. 87 Minn 246.

2. 70 Am. Dec. 128.

3. Law of Agency, pp. 323 to 325 and the authorities cited therein; See also *Ramaswami v. Alagappa*, 26 I. C. 135; *Ramaswami v. Karuppan*, 31 I. C. 216.

4. See also *Ramaswami v. Alagappa*, 26 I. C. 135; *Narain Das v. Chandrabhan*, 48 I. C. 959.

instance by laying down that the principal is bound to act 'at once', 'immediately', 'promptly', or 'as soon as he can', upon receiving knowledge of the unauthorised act, yet the correct rule appears to be that which gives the principal a reasonable time to decide whether he should affirm or disaffirm the unauthorised act, and draw inferences of acquiescence after its expiration. What shall be deemed a reasonable time depends, here as well as in other cases, upon the situation of the parties and the facts and circumstances of each case. Where commercial matter or fluctuating markets or sudden exigencies of trade are involved hours or days may be more important than the weeks and months in other situations. Where a former agent whose authority has been revoked by the principal continues to act after and in spite of such revocation the principal must repudiate his responsibility for such acts immediately he comes to know of them or his assent will be inferred. So also where an agent or servant has committed such heinous or tortuous act without authority as would justify his dismissal, his retention by the master or the principal may warrant an inference that the latter ratifies it. But where the unauthorised act is not of such a nature or where the knowledge of the principal as regards such act is not so perfect as to justify his dismissal, or where his disapproval could be properly shown in any other way than by dismissal, the mere retention of such servant or agent does not warrant the inference of his approval.

The law on the subject is thus summed up in Halsbury's Laws of England¹ :—

"While a ratification must be clear and must bear distinct reference to the facts of the particular case, it need not necessarily be proved by positive acts of adoption. In certain cases it is sufficient evidence of ratification that the intended principal, having all material facts brought to his knowledge and knowing that he is being regarded as having accepted the position of principal, takes no steps to disown that character within reasonable time, or adopts no means of asserting his rights at the earliest period possible.

Acquiescence may take place before or at the time of or after the act acquiesced in. If before, it may be said to operate by way of estoppel, as where a person having a right, and seeing another person about to infringe it, stands by in such a way as to induce the person committing the act of infringement to believe that he assents to it. In such a case he is estopped from afterwards complaining of the act.

Acquiescence after the act, as evidence of its ratification, requires more consideration. Acquiescence, like acts of adoption, cannot avail when the contract or act is *ultra vires* the alleged principal, or is made or done before the alleged principal came into existence, even where such principal has derived advantage from the services rendered.

The acquiescence must be acquiescence in the particular facts and be incapable of referring to another set of facts. Thus

1. Vol. I. (2nd Edn.), pp. 236 to 238.

where an agent in China for the sale of a ship employed, with the principal's knowledge, a sub-agent in Japan, who, unable to sell at the time, himself became the buyer and subsequently resold at a large profit, it was held that there had been no such acquiescence by the principal in the sale as to extinguish the relation of principal and agent which had been created between the principal and sub-agent, and that the principal was entitled to recover from the sub-agent the profit made on the resale.

Acquiescence is stronger evidence of ratification where the relationship of principal and agent previously existed between the parties, and the act to be ratified was rather one in excess of the agent's authority than one which was totally unauthorised. Thus, where a shipmaster who was intrusted with the sale of goods, the proceeds to be devoted to particular purchases, devoted the proceeds to other purchases and advised his employer thereof, it was held that the fact that there was no repudiation by the employer within a reasonable time was evidence that he assented to and ratified the shipmaster's conduct".¹

Ratification
of a written
contract.

It is not necessary that the ratification of a written contract should be in writing, even if the contract be one which is unenforceable unless evidenced by writing, but the execution of a deed can only be ratified by matter of record or by deed.²

Ratification
by
companies.

It has been held under the English law that an act or transaction done or entered into on behalf of a company may be ratified by the directors, if they have power to do or enter into such an act or transaction on behalf of the company;³ and a ratification by the directors may be implied from part performance. Where the act or transaction is beyond the powers of the directors, it can only be effectively ratified by the shareholders.⁴ An act done by the directors in excess of their powers, but within the scope of the memorandum of association, may be ratified by ordinary resolution of the shareholders,⁵ and a ratification by the shareholders is implied if they acquiesce in such an act with a knowledge of the circumstances.⁶

Evidence of
ratification.

It has been held that the receipt of purchase-money is generally sufficient evidence of ratification of a sale, but not

1. See also *Fothergill v Phillips*, 1871, 6 Ch. App. 770, where one tenant in common entered into negotiations for sale, and the other, who allowed them to go on for three years without dissenting, knowing that the mortgagee was threatening to foreclose unless the sale took place, was held too late to allege absence of authority.
2. Bowstead, Art. 31, p. 50 citing *Maclean v Dunn*, (1828), 1 M. & P. 761; *Soames v Spencer*, (1822), 1 D. & E. 32; *Oxford v. Crow*, (1893) 3 Ch. 535, *Hunter v. Parker*, (1840), 7 M. & W. 322; *Twpper v Foulkes* (1861), 30 L. J. C. P. 214.
3. *Wilson v West Hartlepool, etc., Ry.* (1864), 5 De G. J. & S. 475; *Reuter v. Electric Telegraph Co.*, (1856), 26 L. J. Q. B. 46; *Hooper v. Kerr* (1901), 23 L. T. 729.
4. *Spackman v. Evans*, (1168), L. R. 3 H. L. 171, H. L.
5. *Grant v. U. K. Switchback Ry.* (1888), 40 Ch. D. 135, C. A. But see *Boschock etc., Co. v. Fuke*, (1906) 1 Ch. 148.
6. *London Financiat Association v. Kalk*, (1883), 26 Ch. D. 107; *Evans v. Smallcombe* (1868), L. R. 3 H. L. 249; *Re Magdalena Steam Navigation Co.*, (1860), 29 L. J. Ch. 667; *Macdon v. Sutherland* (1854), 23 L. J. Q. B. 229. *Phosphate of Lime Co., v. Green* (1871), L. R. 7 C. P. 43. See Bowstead, Art. 31, p. 50.

if it is received in ignorance of the true facts.¹ Where a solicitor, whose name had been used by another on a bill without authority, received a nominal sum, and was told it was a formality, whereas it was to assist a fraud, this was held not to be a ratification of the act, and he was liable only to the extent of the amount received by him.² In the case of an assault by a railway company's servant in taking the plaintiff, a passenger, into custody, it was held that the fact of the company's solicitor appearing to conduct the charge was no evidence of a ratification by the company.³ The assignment by the principal of the benefit of a contract entered into by the agent without authority is a ratification of such a contract.⁴

Where part owners of a vessel, one of whom had effected insurance of the vessel and had informed all his co-partowners that he had insured for all, and they stood by and did not object to what he had done, this was held sufficient evidence of ratification.⁵ Again, where an entry of the payment of premia had been made in a premia book belonging to part owners of a vessel, which book was open to the inspection of the other co-partowners, who had actually inspected an extract from such book, and has made no objection to the insurance, it was held that the part owner had insured with the authority of his co-owners.⁶

Other
illustrations
of implied
ratification.

In *Anundchunder Bose v. Broughton*,⁷ Mrs. Adams a lady residing in England, who had given authority under powers of attorney from time to time in 1847, 1861, 1862, and 1868 to various persons for the purpose of managing her estate in India, gave such a power to one Shaw who in 1862 granted a *mocurari* lease to the naib of the estate. It appeared that he had done so after full enquiry. Subsequently one Steer was sent out to India to manage this estate and he after inquiries into the matter of the lease, confirmed it. In 1870 the administrator of the estate of Mrs. Adams sued to have the lease set aside on the ground that it had been granted collusively at a low rate. Ratification was held to be proved. It was observed: "We concur with the subordinate Judge in thinking that the owner in England must be presumed to know what was being done on her behalf by her agents. The owner got the benefit of those acts, and it is a fair presumption that she took pains to ascertain what the agent was doing, and to keep herself acquainted with the way in which the estate was being managed". This judgment was subsequently affirmed by their Lordships of the privy Council.⁸

1. *The Bonita, The Charlotte*, (1861) 5 L. T. 141; *Freeman v. Roshier*, (1849), 13 Q. B. 780.
2. *Marsh v. Joseph*, (1897), 1 Ch. 213 (to constitute a ratification there must be full knowledge and unequivocal adoption after knowledge, *per Lord Russell*, C. J. at p. 246).
3. *Eastern Counties Rail Co., v. Broom* (1851), 6 Exch. 314. But see *Carter v. St. Mary Abbots Kensington Vestry* (1890), 64 J. P. 548, C. A.
4. *Thompson v. Hickman* (1907) 1 Ch. 550.
5. *French v. Rackhouse*, 5 Burr. 2727.
6. *Robinson v. Gleadow*, 3 Bing. N. C. 156.
7. 17 W. R. 301.
8. 21 W. R. 425

In *Punchum Singh v. Mungle Singh*,¹ a mortgage was made by a lambardar of his own share, and the shares of his co-sharers of certain property, as agent on their part, in order to raise money to pay Government revenue; it was held that the co-sharers being aware of the fact of the mortgage, and not having at the time repudiated it, and moreover having acquiesced in the decree of first instance which awarded them their shares on payment of their quota of the mortgage debt and interest, must be taken to have thereby consented to the act of the lambardars which was done on their behalf.

Qualified acquiescence is not sufficient for ratification. In *Bhageeruth v. mohan*² one Tookeram was a proprietor of a certain mehal which was in the actual possession of his nephew Durga Pershad, who in the year 1854 in the capacity of mortgagee of Tookeram's mehal executed on Tookeram's behalf a wajiboolarz, and at the time of execution not feeling himself in all probability fully authorised to act for Tookeram, sent for Tookeram to sign for himself, but not finding him, signed for him. Tookeram died in 1857, and his heirs mortgaged the same mehal to some one else. It was contended that there had been an acquiescence in Durga Pershad's acts, and that the heirs of Tookeram were prevented from repudiating the competency of Doorga Pershad to bind him by the Wajiboolurz. Held, that the original proprietor Tookeram was not bound, as Durga Pershad had signed as mortgagee and not as agent; that even assuming Tookeram and his heirs to have been fully acquainted with Doorga Pershad's acts the most that could be inferred was that this subsequent acquiescence supposing it to be established, was only an acquiescence in Doorga Pershad's act to the extent and in the qualified manner in which his consent was given.

Where a husband allowed his wife to have control over certain property, and to mortgage it, it was held that he was not to be allowed to come forward some time afterwards, and defraud the mortgagee by disputing his wife's title.³

Where a person who was a general agent borrowed money for his principal in his principal's name, and the money was carried from the bank from which it was borrowed to the Treasury of the principal, and expended for his use, entries were made in the principal's books as to the loan and the mode by which it was disbursed, and portions of the loan were paid off by ticcadars of the principal under orders or assignments, it was held that there was a sufficient *prima facie* case made out to show that the principal was liable for the money advanced to his agent, as the principal if he had looked into his affairs at all must have been aware of these facts, and as he did not in any way repudiate them.⁴

So also where a principal receives the proceeds of a distress made without authority by his *gomasta*, he thereby tacitly ratifies the act of his *gomasta*⁵

1. 2 Agra H. C., 207.

2. 2 Agra H. C. 129.

3. *Mooradee Beebee v. Syeffoolah*, W. R. (1864), 318.

4. *Bumaree Lal Sahoo v. Mahesh Singh*, 2 Hay. 644.

5. *Ramjoy Mundul v. Kallymohun Roy Choudhry*, Marab, 282, 1 Hay 289.

When the proprietors of an estate on being informed by their agent of a proposal to obtain a lease of the property, refused their consent, and the agent notwithstanding gave the proposer a written order to take possession as lessee, but gave no notice at the time to the proprietors, but subsequently informed them of it, held that the proprietors were not under obligation to take early steps to disavow the act of their agent.¹

Taking interest on money which an agent had lent without authority has been held evidence of ratification.²

Where the sale of goods was a fraud upon the seller, who could have recovered them in an action of trover, the seller was held to have ratified the contract of sale by bringing an action for the price.³

Express ratification may be made orally or in writing or by an instrument under seal. No particular form is necessary it being enough if the words used are sufficiently indicative of an intention of the principal to adopt the act or contract as his own.⁴ But it must be of the same nature as is required for conferring the authority in the first instance.⁵ For instance, where sealed instrument would have been required to confer the authority to do the act, ratification must be made by a sealed instrument.⁶ Where, however, a general agent holding a power of attorney executes a mortgage not authorised by much power of attorney the deed is not void *ab initio* and may become operative if the principal receives the benefits or submits to the liabilities arising thereunder.⁷

Express
ratification.

As in the case of authorisation so in the case of ratification an instrument under seal is not necessary to ratify a contract which though sealed was not required by law to be under seal. Wherever the act of sealing or registration is superfluous as not required by law, ratification may be made verbally.⁸ Where a sealed instrument is required to ratify a deed, it is not necessary that there should be a separate instrument of ratification under seal, but a clause contained in a subsequently executed power of attorney under seal is sufficient.⁹

Where by certain statutes authority is required to be conferred in writing for certain purposes, any act done in connection

1. *Mukbool Baksh v Suheedun*, 14 W R. 378.

2. *Clarke v. Perrier*, (1679), 2 Freem. 48

3. *Ferguson v Carrington*, (1829), 9 B & C. 59

4. See *Maclean v Dunn*, 1 M & P. 761; *Soames v Spencer*, 1 D. & R. 52.

5. "A ratification of an act done by one assuming to be an agent relates back and is equivalent to a prior authority. When therefore the adoption of any particular form or mode is necessary to confer the authority in the first instance there can be no valid ratification except in the same manner" Per Parker C. J. in *Despatch Line v. Bellamy Mfg. Co.*, 87, Am. Dec. 203. See also *Oxford v. Crewe*, (1893) 3 Ch. 535; *Hunter v. Parker*, 7 M & W. 322, *Tupper v. Foulkes*, 30 L J C. P. 214.

6. See Katlar, p. 304 and the authorities cited therein.

7. *Mohammad Hanif v. Iser Prasad*, 19 A. L. J. R. 82; *Nanak Chank v. Muhammad Afzal* 16 L. C. 950

8. *Bless v. Jenkins*, 129 Mo. 647. See Katlar, p. 305.

9. *Milliken v. Coombs*, 10 Am. Dec. 70. But mere power to do acts in the future will not operate as a ratification of the acts already done. See *Britt v. Gordon* 132 Iowa 431.

with those purposes must be ratified by an instrument in writing drawn up as formally as the original authority is required to be drawn up by such statute.¹ So where a statute requires that the authority of an agent to make contracts of suretyship should be in writing, a subsequent parol ratification is sufficient.² Where the statute requires that the agent may have written authority the writing may be a previous authority or may be made at any subsequent stage.³

It is thus clear that except in the cases where authority is required by law to be conferred in writing or by an instrument under seal, in no other cases it is necessary that ratification should be made in writing. Where A entered into a contract for the sale of a quantity of oil without the authority or knowledge of B, and B on receiving information of circumstance, refused to be bound, but afterwards, assented by parol, and samples of the oil were accordingly delivered to the vendees, it was held that B's ratification of the contract rendered it binding on him.⁴

48. Effect of ratification.

Ratification
of unauthor-
ised act
cannot
injure
third person.

An act done by one person on behalf of another without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

(S. 200, Indian Contract Act, 1872).

ILLUSTRATIONS

- (a) A, not being authorised thereto by B, demands on behalf of B, the delivery of a chattel, the property of B, from C, who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.
- (b) A holds a lease from B, terminable on three months' notice. C an unauthorised person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

The effect of ratification is to invest the person on whose behalf the act ratified was done, the person who did the act, and third persons, with the same rights, duties, and liabilities in all respects as if the act had been done with the previous authority of the person on whose behalf it was done.⁵ No ratification, however, can operate to divest or prejudicially affect any proprietary right vested in any third person at the time of the ratification,⁶ or to give the person who ratified a contract a right of action in respect of any breach thereof committed before the time of the ratification.⁷

In *Buran v Denman*,⁸ a British naval commander destroyed certain property and released certain slaves belonging to a

1 See Katiar, p. 306, and the authorities cited therein.

2 *Ragon v Chensult*, 70 Ky 545; *English v Dycus*, 8 Ky L. R. 331.

3 *In re Balfour & Garretts*, 14 Cal App. 261.

4 *Seames v. Spencer*, 1 D. & Ry. 32.

5 Bowstead, Article 32, p. 53.

6 *Ibid.*, S. 200, Indian Contract Act, 1872.

7 Bowstead, Art 32, p. 53 citing *Kidd v.minster v. Harwicke* (1878) L. R. 9 Ex. 13.

8 (1848), 2 H. 167.

Spanish subject resident abroad. The foreign and colonial Secretaries of State ratified the act of the commander. Held, that the ratification rendered the act an act of State, for which no action would lie at the suit of the Spanish subject.

Where property is purchased by one person on behalf of another, without his authority, under such circumstances that dealing with it would amount to conversion, ratification by the person on whose behalf it was purchased, renders him as well as the person who purchased it jointly and severally liable for conversion.¹

A, an agent of a corporation, assaults B, for the supposed benefit of the corporation. The corporation ratifies the assault. It is liable to B in an action for damages.²

Where one person, on behalf of another but without his authority, distrains the goods belonging to a third person, ratification by the person on whose behalf the distress was laid, discharges the distrainer from all liability for wrongful distress, by rendering it lawful *ab initio* by its retrospective effect, if the person on whose behalf the distress was laid had a right to do so;³ otherwise the person distraining and the person on whose behalf the distress was laid, became by ratification jointly and severally liable as trespassers.⁴

A makes a contract on behalf of B without his authority. B ratifies the contract. B is liable on the contract and A is discharged from liability unless he contracted personally.⁵

An agent does not act in excess of his authority. The principal ratifies the act. The agent is not liable to the principal for having exceeded his authority.⁶

Where a person converts the property of a bankrupt by selling or disposing of it without the authority of trustee in bankruptcy, a ratification by the latter by a receipt of the proceeds of such sale or otherwise, discharges the former from all liabilities in respect of conversion.

A factor contracts to purchase goods on his principal's behalf at a price exceeding his limit. The principal ratifies the contract. He must pay the factor the full price.⁷

Where the relatives of a deceased person order an extravagant funeral, the executor or administrator who ratifies the

1. *Hulberry v. Hatton*, (1864), 2 H. & C. 822; See also *Irving v. Moffy*, (1831), 7 Bing. 543.
2. *Eastern Counties Ry., v. Broom*, (1851), 6 Ex 314
3. *Whitehead v. Taylor* (1839), 10 A. & E. 210; *Hull v. Pickering* (1819), 1 Brod. & B. 282.
4. See *Bird v. Brown*, (1850), 4 Ex 786.
5. *Spittle v. Lavender*, (1821), 5 Moore 270; *Koenigsblatt v. Sweet*, (1923), 2 Ch. 314, C. A.
6. *Clarke v. Pottier*, (1879), 2 Freem. 48; *Smith v. Coloman*, (1788), 1 T.R. 189; *Cornwall v. Wilson*, (1750), 1 Ves. 510; *Risbourg v. Bruckner*, (1858), 27 L. J. C. P. 90.
7. *Brewer v. Sparrow*, (1827), 7 B. & C. 310; *Wilson v. Poulter*, (1724) 2 Str. 859; *Smith v. Baker*, (1873), L. R. 8 C. P. 350; *Lythgoe v. Vernon*, (1860), 28 L. J. Ex. 164.
8. *Cornwall v. Wilson* (1750), 1 Ves. 510.

order renders himself personally liable for the whole expense by such ratification.¹

The secretary of a company, without the authority of the directors, sends out a notice purporting to have been issued by order of the board, convening an extraordinary general meeting a requisition for such meeting having been duly served on the company in accordance with the articles of association. At a board meeting held two days before the date for which the general meeting is called, the directors resolve to ratify and confirm the issuing of the notice by the secretary. The notice is thereby rendered valid, and the meeting is duly summoned.²

A insures goods, in which he has no insurable interest, on behalf of B. B, who has an insurable interest in the goods, ratifies the insurance. The insurable interest of B is sufficient to support an action by A on the policy.³

Where the managing owner of a ship sells her through his agent and his co-owners ratify the sale, all the owners become jointly liable to the agent for his commission on such sale.⁴ So, if a principal ratifies the act of a sub-agent, he is liable to the sub-agent for his commission.⁵

A shipmaster entered into contracts with the Admiralty for the transport of troops, and paid and incurred various sums and liabilities to enable him to perform the contracts, the shipowner being bankrupt, and having mortgaged the vessel. Held, that the master had a right to be repaid the expenses and indemnified against the liabilities, out of the freight but from the Admiralty, the assignees in bankruptcy and mortgagees not being entitled to take the benefit of the contract, unless they also adopted the burdens connected therewith.⁶

An agent defends an action brought against him for breach of a contract entered into by him on behalf of his principal. The principal ratifies what he has done. The principal must indemnify the agent against the damages and costs recovered by the plaintiff in the action.⁷ So, where a person is made a party to an action without his authority, he cannot avail himself of the action, unless he pays the costs of conducting it.⁸

A commodore in the navy, without authority to do so, appointed a captain. Held, that even if the Crown ratified the appointment, that would not give the commodore the right to share as a commodore with a captain under him, in prizes taken before the date of the ratification, because the rights to the various shares in more prizes would then be already vested.⁹

1. *Brice v. Wilson*, (1838), 8 A. & E. 349, *Lucy v. Walrond* (1837), 3 Bing. N. C. 841.

2. *Hooper v. Kerr*, (1901), 83 L. T. 729.

3. *Wolff v. Horncastle*, (1798), 1 B. & P. 816.

4. *Keay v. Fenwick* (1876), 1 C. P. D. 745, C. A.

5. *Mason v. Clifton*, (1863), 3 F. & F. 899.

6. *Bristow v. Whitmore* (1861), 9 Q. B. 391—31 L. J. Ch. 497.

7. *Frisoni v. Tagliapietra* (1856), 10 Moo. P. C. C. 175, P. C.; See also *Gleadon v. Hull Glass Co.*, (1849), 19 L. J. Ch. 44.

8. *Hall v. Laner*, (1842), 1 Hare 571—58 R. R. 198.

9. *Donnelly v. Papham* (1807), 1 T. Bunt 1—9 R. R. 687.

Ratification does not, of itself give any new authority to the person whose act is ratified.¹ An effective ratification places all the parties in exactly the same position as they would have occupied in the case of a precedent agency by formal constitution. *Omnia ratihabito retrotrahitur et mandato priori aequiparatur.*²

As against the principal the ratification is retroactive and is equivalent to a prior command. One general effect of the ratification is to bind the principal irrevocably to the consequences of act or contract ratified by him although he can change his mind and revoke a repudiation and turn disaffirmance into affirmance unless the interests of third parties acting on such repudiation become involved.³ If once he has affirmed an act or contract he cannot disaffirm it by any of his subsequent acts.⁴

Ratification
irrevocably
binds the
principal.

The immediate effect of ratification as between the principal and agent is that immediately a transaction is ratified by the principal, the agent is relieved from all responsibility in the matter; its effect on him is therefore to absolve him from all loss or damage arising out of his previous unauthorised act. Where a contract is ratified the agent is relieved from personal liability to his principal for acting in excess of his authority, and may recover his commission and expenses. The principal must perform the contract made by the agent in its entirety and the agent is relieved from personal liability to the other contracting party for breach of warranty of authority, the only remedy of such party being against the principal, unless the agent contracted in his own name.⁵ In the case of a tort the agent remains liable, and the principal becomes liable as well, unless the wrong is justified by the ratification; it being no justification for the commission of a tortuous act that the wrongdoer is acting under another's authority, unless that other can justify the wrong.⁶

Principal
and agent.

In case of
contract.

In the case
of a tort

As a general rule therefore ratification by the principal absolves the agent from all responsibility to the principal for any loss or injury which might result to him from the unauthorised transaction and also gives the agent the same rights to compensation, reimbursement, and indemnity to which he would have been entitled if the transaction had been previously authorised.⁷ These consequences, however, do not invariably follow and there have been found cases in which the principal, while bound by the transaction so far as third persons are concerned, on account of his ratification has been held to be entitled to claim damages against the agent for doing the unauthorised act or exceeding his authority and to refuse any

1. Bowstead, Article 32, p. 58.

2. *Maclean v. Dunn*, (1828), 4 Bing. 722. *Firth v. Staines*, (1897) 2 Q. B. 70; *R v Chapman Ex parte Arlidge*, (1918) 2 K. B. 298, *Koenigsblatt v. Sweet* (1923) 2 Ch. 314, C. A.

3. S. 200, Indian Contract Act 1872.

4. See Katlar, p. 342 and the authorities cited therein.

5. See Halsbury, Vol I (2nd Edn.), Art. 407, p. 238, and the authorities cited therein.

6. *Ibid.*

7. See Mechem, S. 491.

remuneration to him for such act.¹ The principle laid down is that as ratification generally depends upon the intention of the principal, either expressed or implied from his conduct and surrounding circumstances, and as it often happens that the principal, by his laches or otherwise is precluded from denying the validity of the transaction for want of authority so far as third persons are involved, unless the principal, with full knowledge of all the facts of the transaction, expressly approves it, the mere fact that he is bound by the transaction to the third persons, does not warrant an inference that he fully adopts the act as his own thereby absolving the agent from all liability for any loss that might result to him by it and renders himself liable to him for the remuneration, compensation and indemnity to which he might have been entitled if previously authorised.² It is not only possible but often most probable that the laches or any other conduct of the principal which precludes him from denying the validity of the transaction, may have been induced by the agent's own misconduct such as false assurances or persuasions or false representations or reports, or it may have resulted from an endeavour to save himself and all parties concerned from unnecessary loss, without ever meaning in fact to approve or affirm the agent's conduct in the transaction. In such case it would be very unjust to construe the conduct of the principal as an approval of the act so far as the agent himself is concerned and thereby to give the latter a benefit of own misconduct towards his master.³ It is also possible, of course, that the principal may, at the express or implied request of the agent, have proceeded with the transaction so far as the other party is concerned, for the purpose of saving the agent from loss, and without waiving or intending to waive his claim against him. There may also be cases in which the principal, for the purpose of saving greater loss, has performed the contract with the other party, and in which although the agent may not be liable to the principal, he should not be allowed to recover compensation or commission for the unauthorised act. So where the agent, in violation of instructions, has bound the principal to the third parties, the fact that the principal performs or receives performance so far as the other party is concerned is not such a ratification as will release the agent from his liability to the principal for breach of duty⁴ and where the principal, in such a case, has performed to the other party as he was bound to do, the fact that he demands or sues to recover from the agent, who has received the fruit of the correlative performance of the other party, does not amount to a ratification so as to release the agent from all liability to the principal.⁵

It has been held that recovery by the principal of what in equity belongs to him or to which he becomes entitled by the performance of the part which he was bound to perform, is not

1. See *Mechem*, §§. 492 and 493.

2. *Triggs v. Jones*, 46 Minn. 277.

3. See *Mechem*, §§. 490 and 492.

4. *Mechem*, §. 493; *Mechanics' & Traders' Ins. Co. v. Rion*, 62 S. W. 44.

5. *Continental Ins. Co. v. Clarke*, 126 Iowa 274.

a ratification of the original wrongful act of the agent which was the cause of the principal's unwarranted liability.

Accordingly, it was held that where an agent had been given a deed to deliver only when a certain corporation was organised and shares in stock in it delivered to the agent for the principal, but the agent, in violation of these instructions, made an immediate and absolute delivery of the deed, the principal was allowed damages against the agent, although he had helped in the subsequent attempts to organise the corporation and had failed to repudiate the transaction for so long a time that the Court thought that as to the grantor he should be held to have ratified the transaction inasmuch as the property, the subject of grant, passed to a *bona fide* purchaser.¹ In *Brown v. Foster*,² an agent had made a sale of a machine upon conditions not authorised by his principal, that the machine might be returned if the purchaser did not find it satisfactory, and the principal had, upon the purchaser's complaint, offered to substitute another machine. He was allowed to treat the agent's unauthorised delivery as a conversion and to recover the value of the machine from the agent. An agent, who had been instructed to issue no policy upon a particular risk, did issue such a policy, and before the principal's letter in reply to the agent's report, ordering cancellation of the policy could reach the agent, the loss occurred. The principal settled with the insured and received the premium from the agent. The court held that this was not a ratification of the agent's act so as to release him from liability to the principal for doing unauthorised act. Where an agent is also authorised to sell goods on credit but up to a certain amount only, and he sells and gives credit for more than that amount, accepting the buyer's notes for the price, the fact that the principal seeks to collect upon the notes does not relieve the agent.⁴ Similarly, where an agent having authority to lend money, lends it on a prohibited kind of security, the mere fact that the principal recognises it as a valid loan to the borrower, does not relieve the agent from liability if the money be lost by reason of the defective security.⁵ In *Continental Insurance Co., v. Clark*,⁶ an insurance agent had issued the policy at a rate of premium lower than the Company allowed and loss occurred before the Insurance Company had been informed. The Company paid the claim made by the insured and demanded of the agent the premium which the insured had paid. In a suit against the agent by the Company, to recover the loss which the company had suffered, it was held that there was no ratification of the agent's wrongful act either in the demand for the premium or in the fact that the premium was again claimed in the declaration.

If the agent has kept back or suppressed some material facts and the principal ratifies his act, and even if the agent

1. *Triggs v. Jones*, 46 Minn. 277.

2. 137 Mich. 35.

3. *Mechanics' and Traders' Ins. Co. v. Rion*, 62 S. W. 44.

4. *Pacific Vinegar and Pickle Works v. Smith*, 152 Cal. 507.

5. *Bank of St. Mary v. Calder*, 3 Strob. (S. Car.) 403.

6. 126 Iowa. 274.

communicates to the principal all the facts known to him at the time but it afterwards turns out that the facts communicated were not the real facts of the case, in either case the agent is not relieved by ratification made under such misapprehension although in the latter case the facts and circumstances may have been innocently concealed and inadvertently misrepresented.¹ Again, so far as the agent's liability to the principal for doing an unauthorised act or exceeding his authority is concerned, the agent's motives in the transaction are altogether irrelevant although, perhaps his *bona fides* or *mala fides* may be taken into account in assessing damages. If he deviated from his duty he becomes liable to the principal for such losses as are not direct and material result of such deviation where his motives were good or bad and he is only released from such liability where the principal with full knowledge of all the material facts ratifies his departure from duty.²

The conduct of the principal should, however, be liberally construed in favour of the agent in affecting ratification especially if the alleged agent was already an agent for some purpose and not a mere stranger. A principal, who receives knowledge of facts indicating a breach of duty by his agent, and who suspects him while the transaction is still executory and he can then protect himself, will not be permitted to, then proceed to communicate the transaction and sustain a loss and afterwards recover damages from the agent. Where the principal's inaction in the matter of this sort at the time when he could by repudiation save himself from liability to third person or from any loss, is due, not to any misapprehension of facts for want of information or a misrepresentation of the agent, but to his own wavering mind or in expectation of making some gain from the unauthorised act it will amount to ratification of an agent's act and will preclude his principal from claiming damages from the agent.³

Principal,
agent, and
third
parties.

The effect of ratification as between the third party and the agent is, that it will relieve the latter from all responsibility, save in the case of a ratification of a tort committed by the agent; for in such case both the principal and agent will be liable to such third person. Its effect as between the third party and the principal is that as soon as the ratification has taken place, the former is in a position to demand from the principal full performance of the contract or other transaction entered into by his agent. As between the principal and third parties, although ratification will in general bind the principal and render him liable to be sued by such third party, yet this rule is not universally applicable. Where the act is beneficial to the principal and does not create an immediate right to have some act or duty performed by a third party, but amounts simply to the assertion of a right on the part of the principal, there the rule seems generally applicable. But where the unauthorised act done by the agent, would, if authorized, have the effect of

1. See Katjar, p. 346 and the authorities cited therein.

2. Mechem, §. 497.

3. Katjar, pp. 346 and 347 and the authorities cited therein.

subjecting the third person to damages, or of terminating any right or interest of the third person, it cannot by ratification, be made to have such effect.¹ Thus, a demand of goods made by an unauthorized agent on behalf of the owner will not by subsequent ratification by the owner support an action of trover.²

The rule laid down in section 200 of the Indian Contract Act, 1872, is the converse of the principal that a voidable transaction cannot be rescinded to the prejudice of third persons' rights acquired under it in good faith.³ Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time. The rule is also stated in the form that ratification, to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself.⁴ The ratification of a contract does not give the principal a right to sue for a breach committed prior to the ratification.⁵ A holds a lease from two joint receivers, B and C. B, without C's authority, gives notice to quit to A. The notice cannot be ratified by C so as to be binding on A.⁶ If notice to quit is given by an unauthorized person, a subsequent ratification will not make it effectual, since the notice must be one which is in fact binding on the landlord when it is served.

When the only objection to the grant of a melcharth is that it was granted without proper authority, it can be subsequently ratified by the person who has power to grant it.⁷

It is to be noted that different considerations are involved in the cases of contract and those based on tort. In a case of contract, where the contract has been made in the name and on behalf of an alleged principal and the latter, with full knowledge of the facts, has ratified it, the contract then becomes in fact, so far as the rights of the other party are concerned, what at first it only assumed to be—the contract of the principal. The other party has then what he contracted for—the liability and responsibility of the principal, and he can obviously suffer no injury from the fact that the agent's act was originally unauthorized. The agent, therefore, drops out of sight. His identity is thereafter, merged in that of the principal and he cannot personally call upon the other party for performance, nor can performance be demanded of him. He cannot sue in his own right nor can he be rendered personally liable upon the ground of the failure of an assumed authority.⁸ The fact that the principal fails to perform the contract on his part does not revive the liability of the agent.⁹ Where, however, before ratification the

1. See Section 200, Indian Contract Act, 1872 and the illustrations cited at p. *supra*
2. *Solomons v. Dawes*, 1 Esp.; 83
3. The section is not exhaustive of the general rules of the law on the subject: See *Thinnappa Chettiar v. Krishna Rao*, A. I. R. 1941 Mad. 6=195 I. C. 329= (1940) 2 Mad. L. J. 726.
4. *Bird v. Brown*, (1850), 4 Ex. 786=80 R. R. 775.
5. *Kiddermister v. Hardwick* (1873), L. R. 9 Ex. 13.
6. *Cassim Ahmed v. Eusef Haji Ajam* (1916), 23 Cal. L. J. 453=34 I. C. 221. Joint receivers, unlike joint owners, should all join in giving the notice.
7. *Kozhikot v. Sankara*, 73 L. C. 376.
8. See *Mechem*, §. 549 and the authorities cited therein. See also *Pestonji v. Gool Mohammad*, 7 Mad. H. C. R. 369.
9. *Lingenfelder v. Leschen*, 134 Mo. 55.

other party brings a suit for damages for the injury caused to him by the unauthorised contract, or even where injury has resulted to the other party from such want of authority, or where the effect of making the ratification relates back would be to put the other party in a worse position than he would otherwise have been in, in consequence of such unauthorised act of the agent, the agent is not released from his liability to the other party by a subsequent ratification.¹ In the cases of tort where the agent's unauthorised act is such that it is tortious only because it is done without any previous authority, otherwise the principal is justified in doing the act himself, the effect of ratification, in general, will afford the agent the same protection as though it had been originally authorised.² Where, however, the principal himself is not justified in doing the act, ratification will have the effect of only making the principal also jointly and severally liable with the agent to the other party and will not effect a release of the agent from such liability.³ So it is no defence to one who is sued for committing trespass to reply that he acted as the agent of another unless he also shows that that other was justified in doing it himself or through his agent.⁴ In the case of public agents, however, the rule is different. "If the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass".⁵

As noticed above, the unauthorized act of the agent cannot be ratified by the principal if it would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person. What does "damages" mean? Does it mean legal damages only. If it is, it is uncertain whether section 200 of the Indian Contract Act, 1872, would cover a case when the third person is put to the expense, and consequent loss in costs of a successful suit for specific performance brought against him by the person for whom an unauthorised agent is acting. If this view is correct, then an act by an unauthorized agent which merely makes a third person liable to a suit for specific performances, as distinguished from a suit for damages, might fall within the principle of *Bolton Partners v. Lambert*⁶ and admit of the act being ratified by principal. In this case an offer of purchase was made by the defendant to Scratchley, who was the agent of Bolton Partners (the plaintiffs), but was not authorized to make any contract for sale. The offer was accepted by Scratchley on behalf of the plaintiffs. The defendant withdrew his offer, and after the withdrawal, the plaintiffs ratified the acceptance of the offer by Scratchley. In an action

1. Mechem, § 543, *Sheffield v. Ladue*, 16 Minn 388

2. *Hull v. Pickersgill*, 1 B. & B 282, Mechem, § 545

3. See Katar, p 348 and the authorities cited therein

4. See Mechem, § 546

5. *Buran v. Dennan*, 2 Exch 167, *Secretary of State v. Kamacker*, 13 Moo P. C 22; *Cheetham v. Manchester*, L. B. 19 C. P. 249; *Wiggins v. United States*, 8 Ct. Cl 413

6. L. R. 41 Ch. D. 295.

by the plaintiffs for specific performance, it was held that the ratification of the plaintiffs relates back to the acceptance by Scratchley, and therefore the withdrawal by the defendant was inoperative, and the plaintiffs were entitled to specific performance. It will be noticed that the question under the Contract Act would be whether the act of Scratchley in accepting the offer, *would have* the effect of subjecting the defendant to damages, it *might* have done so, if he had merely accepted the offer and failed to carry it through; but it *would* not necessarily have done so, for he might have sold. The case, in fact, is an extension of the principal of the relation back of ratification to the original act done by an unauthorised agent¹

It has been laid down that the principal who expressly ratifies the act or contract with knowledge of the facts must assume responsibility for such of the instrumentalities by which the act or contract was induced, as he would have been obliged to assume if the act had been done or the contract would have been made by his prior authority.² Hence if there were terms or provisions or conditions, upon which the contract as made was based, or if there was fraud, deceit or misrepresentation which would have affected the principal had the act or contract been authorised, the principal who ratifies with knowledge must ordinarily assume responsibility for these instrumentalities.³ Even though he may, at the time of receiving the benefits of the act, have been ignorant of the practices resorted to, still if, instead of attempting or offering to undo the wrong or permitting it to be undone where it is practicable, he expressly ratifies or insists upon having or retaining the fruits of the malpractice of his agent after he is advised of it, he must ordinarily assume the same responsibility for the means by which these fruits were procured which he must have assumed had the act been authorised. Whether the instrumentality employed was fraudulent or merely a matter of warranty or promise, the rule in either case is the same.⁴

Ratification when makes the principal responsible for the instrumentality employed by the agent in effecting the act of contract.

The responsibility for instrumentalities, however, does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority and not known to the principal at the time of receiving the proceeds, though such collateral contract may have been the means by which the agent was enabled to affect the unauthorised contract, and the principal retain the proceeds thereof after knowledge of the fact⁵ "It cannot surely be said" observes Jenkins J., "that under such circumstances the retention of the money was an act of affirmance. To so hold would place every principal at the mercy of his agent with respect to matters as to which he had conferred no apparent authority. So that if one should authorise his agent to sell his house for Rs. 20,000 and the agent selling the house for that sum should include in that sale certain bank stock which he was not authorised to sell, and of which he had no possession, the

1. See Pearson's Law of Agency, p. 75.

2. Mechem, §. 411.

3. Ibid ; See Katrar, p. 349 and the American authorities cited therein.

4. *Western Bank of Scotland v. Addie*, L. R. 1 H. L. (Sc.) 145 ; *Houldsworth v. Glasgow Bank*, 5 App. Cas. 317.

5. *Smith v. Tracy*, 36 N. Y. 79.

principal by the mere receipt and retention of the sum which he had authorized to be taken for the house, and in ignorance of the fact that the bank stock was part of the consideration running to the purchaser, would be bound to deliver the stock. I cannot yield assent to such doctrine."¹ The result, however, in such cases, is that the contract becomes binding on the other party, and the principal can obtain specific performance of it without undertaking the performance of the collateral contract, but only to relegate the parties to their former position as if there had been no contract at all and entitling either of them to such claims against the agent for his unauthorized act as the loss suffered by them on this account would allow.² As soon as the principal learns the facts, it would, in general, be incumbent upon him, unless he wishes to affirm the contract, to offer to restore what he may have received under the negotiations, and of the other party, likewise, to restore what he has received.³ Refusal of the principal to disaffirm such contract upon a proper request from the other party or the agent, would, doubtless, often amount to ratification, though it is not necessarily so, in every case. A collateral stipulation which makes the whole contract illegal, however, stands on a different basis. No one can reasonably suppose that such stipulation was authorized or will be approved by the principal. A person who enters into a contract with an agent is expected to make lawful contract and not an illegal one. If he sets up, against an actually innocent principal who is seeking to enforce an apparently lawful contract, and illegal stipulation to which he was a voluntary party, and which will make the whole transaction illegal, he is entitled to a very little consideration and will not be permitted to do so.⁴ Where a special agent sent out with a printed form of contract to make contracts for purchase of cotton took from the defendants and delivered to his principal on apparently regular and lawful contract upon one of the forms so furnished for the sale of the defendant's cotton to the plaintiff and on seeking to enforce it the plaintiff was met by defendant's contention that the contract was really made upon the terms that the cotton should not in fact be delivered but the contract should be performed by paying only the difference in value, it was held that such a collateral stipulation being a gambling contract was illegal under the statute and could not be set up.⁵ A collateral stipulation or act of this sort not included in the very contract upon which the principal sues, cannot be set up to invalidate the loan which was otherwise valid.⁶

Effect of
ratification
on an offer
already
withdrawn
or on a
contract
already
cancelled

As already noted, a contract, in order that it may be validly ratified and made binding on the principal and the other party, must be a subsisting one. So long as it is not ratified by the principal it is purely a matter between the agent and the other party. Hence if the agent and the other party have

1 Per Jenkins J. in *Wheeler v North-Western Sleigh Co*, 39 Fed. 344

2 Mechem, §s 413 ; 436 and 513.

3. Ibid See also Mechem, §s 435 and 436

4 Mechem, §. 414 and the authorities cited therein.

5. *Terry v International Cotton Co.*, 138 Ga. 656

6. See *Condit v. Baldwin*, 21 N. Y. 219 ; *Hall v. Maudlin*, 58 Minn. 137

consented to cancel the contract before the principal exercises his option to ratify or repudiate it, he has no cause for a complaint. He cannot compel the agent to keep himself in a dubious position and incur the personal liability for the contract if he chooses to repudiate it. A ratification, therefore, after the contract has been cancelled by the agent and the third party by mutual consent is ineffective.¹ Thus, where a former agent without authority had paid the debt for his former principal, but, afterwards and before the latter had ratified it, went to the creditor to whom payment was made and requested him to return the money which he did and then sued the principal, it was held, that the latter could not by ratification avail himself of the payment in defence. "*Prima facie*" observed Kelly C. B., "we have here a ratification of the payment by the defendant's plea; but whether payment was then capable of ratification depends on whether previously it was competent to the plaintiff and the agent apart from the defendants to cancel what had taken place between them. I am of opinion that it was competent to them to undo what they had done. The evidence shows that the plaintiff received the money in satisfaction under the mistaken idea that the agent has an authority from the defendant to pay him. This was a mistake in fact on discovering which he was, I think, entitled to return the money and apply to his debtor for payment. If he had insisted on keeping it, the defendant might, at any moment, have repudiated the act of the agent and latter would then have been able to recover it from the plaintiff as money received for his use. I am therefore of opinion that the plaintiff who originally accepted the money under an entire misapprehension was justified in returning it, the position of the parties not having been in the meantime in any way altered and that the defendant's plea of payment fails."³ In *Stilwell v. Staples*⁴ where insurance was affected by a person of his own goods and those of another person without the latter's authority and the former before ratification cancelled the contract of insurance and surrendered the policy, the court held that the surrender was justified observing: "So long as the option of the owner of the goods to adopt or reject the policy continues, so long must the absolute control of the agent over the policy remain."

It is also to be observed that if the contract is voidable at the option of the other party for any reason other than the mere want of authority which alone can be covered by ratification, it continues to be voidable even after ratification until such person by his conduct or otherwise, waives or loses his right to avoid it. It is also to be noted that except by mutual consent or by virtue of a right to avoid the contract, neither the agent nor the other party is at liberty to cancel a contract after it is completed merely because it is not yet ratified.⁵

1. *Walter v. James*, L R 6 Ex. 124; *Stilwell v. Staples*, 19 N. Y. 401; *Meehem*, 55 511 and 512. See also *Katlar*, p. 352

2. *Walter v. James*, L. R. 6 Ex. 124.

3. *Ibid.*

4. 19 N. Y. 401.

5. See *Katlar*, p. 353 and the authorities cited therein. See also *Bolton Partners v. Lambert*, 41 Ch. D. 295; *Fleming v. Bank of New Zealand*, 89 L. J. P.C. 120.

Another set of cases is also to be noted. Where a person enters into a contract with an agent under a mistaken belief that he has authority to contract and subsequently he discovers his mistake and in order to avoid the dubious position which the option of the principal to ratify or repudiate such contract, would put him in, he will withdraw his offer or acceptance as the case may be, there appears to be no reason why he should not be allowed to do so. To hold him bound with perhaps the market rising while the principal is free to ratify or reject is to place him at an undesired disadvantage.¹ The case is quite different however where the contract is entered into by the other party with full knowledge that the agent has no authority and that the principal from whom such contract is made may ratify or reject it at his option. In such case the other party voluntarily takes the risk and cannot withdraw the offer after it is accepted by the agent even though such acceptance in order to bind the principal stands in need of his ratification.² Ratification, however, in such cases must be made within a reasonable time and a withdrawal after such time in the absence of ratification has been held to be justified.³ It has been observed that the view taken in certain cases that the other party cannot withdraw an offer once made and accepted by the agent seems to be too widely stated and so is also an unqualified statement that in every case the other party is free to withdraw from the contract before it is ratified. So where the withdrawal is justified the subsequent ratification is inoperative, while where it is not justified it affects a binding contract against the other party in spite of such withdrawal.⁴ The rule has been stated in the German Civil Code in the following words:—

“Before ratification of the contract the other party is entitled to revoke it unless he knew of the absence of the authority at the time when the contract was entered into”.⁵

Retrospective effect of ratification.

As already noted, ratification, if effective at all, relates back to the date of the act ratified. If an action is brought in a man's name without his knowledge, he may adopt the proceedings and make them good at any time before trial.⁶ The rule goes so far that if A makes an offer to B which Z accepts in B's name without authority, and B afterwards ratifies the acceptance, an attempted revocation of the offer by A in the time between Z's acceptance and B's ratification is inoperative.⁷ So long as the professed agent purports to act on behalf of the

1. See *Katlar*, pp 353, 354; See also *per chitty J in Dibbinsd v Dibbins*, (1896) 2 Ch. 348.

2. See *Mechem*, §. 522.

3. *Metropolitan Asylum Board v. Kington*, 6 T. L. R. 217, *Katlar*, p. 354.

4. See *Katlar*, p. 354 and the authorities cited therein.

5. The German civil code, §. 178, as translated by Dr Wang.

6. *Ansons v. Marks* (1882), 7 H. & N. 686=126 R. R. 646. The action was on negotiable instruments, and the most plausible form of the agreement for the defence was that the plaintiff was not the holder of the instruments at the time of suing.

7. *Bolton Partners v. Lambert* (1889) 41 Ch. D. 295. This decision has been freely criticised, but for the present remains authoritative. It is open to reconsideration in a Court of last resort; See the judgment of the Privy Council in *Fleming v. Bank of New Zealand*, (1900), A. C. 577, 587. See *Fallock and Mulla* p. 554.

principal, it is immaterial whether in his own mind he intends the principal's benefit or not, and what his real motive and intention may be; nor does it make any difference if the third party discovers before ratification that the agent meant to keep the contract for himself.¹ In fact, the third party gets by the ratification exactly what he bargained for.

But if Z pays money to B as in satisfaction of A's debt, and B afterwards discovering that Z had no authority, returns him the money by agreement between them, A can no longer adopt the payment and rely on it as a discharge. A man is not bound to accept payment of a debt, or satisfaction of any other obligation from a stranger to the contract, though if B had accepted the payment with knowledge of Z's want of authority, or acquiesced in it after he obtained that knowledge, he would have been estopped from denying Z's authority as against A.²

If an offer is accepted by an agent subject to ratification no contractual relationship with the principal comes into existence until ratification and therefore up to that moment the offer can be withdrawn.³

1. *Re Tiedemann and Ladermann Freres*, (1899) 2 Q. B. 66.
2. *Walter v. James* (1871) L. R. 6 Ex. 124 cited at p. .
3. *Watson v. Davies* (1881) 1 Ch. 455.

CHAPTER VIII

DELEGATION.

49. Delegation of authority by agent. 50. Relations between principal and sub-agent. 51. Joint-Principals and Joint-agents.

49. Delegation of authority by agent

Meaning of term.

By delegation is here meant the devolution from one agent upon another person of a power or duty, intrusted to the agent by his principal.¹

General rule against delegation

Delegatus non potest delegare is the maxim which lays down the general rule that an agent cannot delegate his powers or duties to another, in whole or in part, without the express authority of the principal.² The presumption is that an authority given to an agent is exclusively personal, and cannot be exercised through another where from the nature of the agency trust is reposed in personal qualifications of the particular agent.³ And it may be generally laid down that the presumption is that there is no authority to delegate the agency to another unless from the express language used in the appointment to the agency, or from fair presumptions growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent.⁴ Generally speaking, therefore, where there is personal confidence reposed or skill required there can be no delegation. however general the nature of the duties, unless urgent necessity compels the handing over of the responsibility to some one else.⁵ Thus auctioneers, factors, directors, liquidators, brokers etc., have in general no implied authority to employ deputies or sub-agents.⁶ In England the auctioneer at a sale by auction "is the agent of the purchaser as well as of the seller, and has authority to sign a memorandum of the sale so as to bind both parties," but he cannot of his own motion delegate that authority to his clerk.⁷

The general rule is thus laid down by Bowstead⁸ :—

When agent may delegate his authority.

"No agent has power to delegate his authority, or to appoint a sub-agent to do any act on behalf of the principal, except with the express or implied authority of the principal. The authority of the principal is implied in the following cases:—

1. See Halsbury, Vol I (2nd Edn) Article 385, p. 228.
2. *Sims v Britain* (1832) 1 Nev. & M. (K. B.). 594
3. Broker *Solly v Rathbone* (1814), 2 M. & S. 298, broker: (*Cockran v Islam* (1814), 2 M. & S. 301 managing owner: *Sims v Britain*, supra
4. See Story on Agency, §. 14. "One who has a bare power or authority from another to do an act must execute it himself and cannot delegate his authority to another" Story on Agency, §. 13
5. Halsbury, p. 224
6. Bowstead, p. 85, and the authorities cited therein.
7. *Bell v. Balls* (1897) 1 Ch. 563, 569.
8. Law of Agency, 9th Edn., Art. 42, p. 84, and the authorities cited therein.

(1) Where the employment of a sub-agent is justified by the usage of the particular trade or business in which the agent is employed, provided that such usage is not unreasonable, nor inconsistent with the express terms of the agent's authority or instructions.

(2) Where the principal knows, at the time of the agent's appointment, that the agent intends to delegate his authority.

(3) Where, from the conduct of the principal and agent, it may reasonably be presumed to have been their intention that the agent should have power to delegate his authority.

(4) Where, in the course of the agent's employment, unforeseen emergencies arise which render it necessary for the agent to delegate his authority.

(5) Where the authority conferred is of such a nature as to necessitate its execution wholly or in part by means of a deputy or sub-agent.

(6) Where the act done is purely ministerial, and does not involve confidence or discretion."

Lord Justice Thesiger explained the rule thus¹ :—

"As a general rule, no doubt, the maxim *delegatus non potest delegare* applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analyzed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken personally to fulfil; and that inasmuch as confidence in the particular person employed is at the root of the agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do, from time to time, render necessary the carrying out of instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case the reason of the thing requires that the rule should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a 'sub-agent' or substitute; and on the other hand to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied, where from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of the employing of a substitute". In that case a merchant in England wished to sell a ship which was in China, and it had to be sold by sending it to different ports where there might be a market, and among other places it was sent to Japan.

1. *De Bussche v. Alt.* (1878), 8 C. D. 286, at p. 310.

Illustrations.

A shipmaster was authorised to sell certain goods. Held, that he had no implied authority to send them on to another person for sale, though he was unable himself to find a purchaser.¹

A board constituted by statute was authorized to delegate its powers to a committee. Held, that the committee must exercise in concert the powers delegated to them, and could not apportion them amongst themselves.²

The directors of a company were given power to purchase the company's own shares, and also to appoint a general manager. Held, that the power to purchase shares could not be delegated by the directors to the general manager.³

An agent buys property at a sale by auction, and the auctioneer enters his name as buyer without objection by the principal, who is present at the sale. The entry is a sufficient memorandum of the contract as against the principal.⁴ But where a tenant for life had a power to lease, and a memorandum of a contract for a lease was signed by his agent's clerk with the approval of the agent and in the ordinary course of business, it was held that the memorandum was not sufficient to satisfy the statute of Frauds; not having been signed by a duly authorised agent within the meaning of that statute.⁵

An agent has authority to draw bills of exchange in the principal's name. The authority may be exercised through the agent's clerk.⁶ So, an authority given to an agent, to indorse a particular bill in the principal's name may be delegated, because such acts are purely ministerial and involve no discretion. So, it was held that though four liquidators had no power to authorise one of their member to accept bills of exchange on behalf of them all, they might authorise him to accept a particular bill on their behalf, because the execution of the former authority would involve discretion, whereas the latter was an authority to do a purely ministerial act.⁷

Authority to do an illegal act cannot be delegated.

It has been held under the English law that there can be no delegation to a sub-agent of power to do anything that is illegal or criminal, for any contract to tempt a man to transgress the law and do that which is injurious to the community is void at common law,⁸ and the law will defeat any contract which is to do something which is a *malum in se*, or to omit doing something that is a duty, or which would tend to encourage crime, and this without regard to the circumstances, as it is concerned to remove all temptations and inducements to crimes.⁹

1. *Catlin v. Bell*, (1815), 4 Camp. 183.

2. *Cook v. Ward* (1877), 2 C. P. D. 255, C. A.; but see *Agnew v. Manchester Corporation* (1902), 67 J. P. 174.

3. *Cartmell's case* (1874), L. R. 9 Ch. 691.

4. *White v. Proctor*, (1811), 4 Taunt. 209.

5. *Blore v. Sutton*, (1815), 4 Meriv. 237.

6. *Ex p. Sutton* (1788), 2 Cox 84; *Brown v. Tombs* (1891) 1 Q. B. 253.

7. *Ex p. Birmingham Banking Co.*, (1868), L. R. 3 C. Ch. 651.

8. *Collins v. Blantern* (1767) 2 Wils. 341.

9. *Per C. J. Parker in Mitchell v. Reynolds*, *Smith's Leading cases*, 9th Edn.: Vol. I, p. 480, and 1 p. Wms. 181.

Judicial
authority
cannot be
delegated.

An agent whose authority is of judicial character cannot delegate it. In *Little v. Newton*¹ two lay arbitrators deferred their decision to a third who was a Barrister, on a point of law. The court held they had no power to do so. Tindal, C. J., said: "There is no principle of law that we are aware of which will authorise any such delegation of the judicial authority conferred upon the three and it is impossible to say that if the determination of a legal arbitrator had been disclosed to either of the other arbitrators before the signature of the award some argument or observation might not have been made which would have led to a different conclusion".

In another case of an award by arbitrators,² it was decided that they might consult the umpire, but could not give up their own opinion to be bound by him. It was observed in this case; "It appears not that he (Mr. Southern, one of the arbitrators) consulted Mr. Peacock (the umpire) and was satisfied by him of the land being worth 400*l.* an acre, but that he consulted Mr. Peacock and, finding that he said, 400*l.* was the value, he (Mr. Southern) although he did not think it worth 200*l.* an acre concurred in the award because he thought it no use differing. That is not a course which referees have a right to pursue, and an award so made was not one by which the persons (the principals) who had agreed to take the reference were bound. They were entitled to have the unbiassed judgment of the umpire; not in a loose way giving an opinion, but dealing judicially with that upon which it was his duty to decide."³

So again, where a judge, instead of exercising his discretion in appointing a liquidator, directed he should be appointed on the nomination of the third party without approving of the nomination first, the court of Appeal held such a delegation of authority was bad.⁴

Parliament, in granting railway companies statutory powers, at the same time imposed personal duties. It has been held, therefore that under the English Law these powers cannot be delegated. So the court refused to enforce an agreement between the two railway companies which it held was a practical delegation by one of them of all the powers that Parliament had given it.⁵ Vice Chancellor Turner said:—"I think there lies at the root of this case a question of public policy which precludes the inference of the court. It is impossible to read the agreement between the plaintiffs and the East Anglian Railway Co. without being satisfied that it amounts to an entire delegation to the plaintiffs of all the powers conferred by Parliament upon the East Anglian Railway Co. All the stock of that company is to be taken by the plaintiffs without any obligation to restore it; the plaintiffs are to manage and regulate the railways of the East Anglian Railway Co., for the purposes of the agreement; and although in form it is declared that the instrument shall not operate as a lease or an agreement, it

Where
against
public policy
authority
cannot be
delegated.

1. (1841), 2 Scott, N. R. 509, at p. 519.

2. *Eade v. Williams* (1854), 4 De G. M. & G. 674.

3. See also Mr. Justice Shree's judgment in *Ellison v. Bray* (1864), 9 L. T. 730.

4. *Re Great Southern mysores Co.*, (1883), 48 L. T. 11.

5. *G. N. Ry., v. Eastern Counties Ry.* (1851), 21 L. J. 837.

amounts in substance to either one or the other. It is framed in total disregard of the obligations and duties which are attached to the companies, and it is an attempt to carry into effect without the intervention of Parliament which cannot be lawfully done except by Parliament in the exercise of its discretion with reference to the interests of the public."

Trade usage
or custom:
delegation of
authority.

As already noted,¹ where the employment of the sub-agent is justified by the usage of the particular trade or business in which the agent was employed, the agent can delegate his authority, provided that such usage is not unreasonable or inconsistent with the express terms of the agent's authority or instructions. Parties contracting in reference to a subject matter concerning which there exists a custom or usage authorizing the agent to employ sub-agent, may be well presumed to have such authority in contemplation in the absence of a contract to the contrary inasmuch as *in contractis tacite insunt quae sunt moris et consuetudinis* is the maxim which applies to such case. Where goods were entrusted by the plaintiff, to a merchandise broker to sell, deliver, and receive payments, and the broker deposited them in accordance with the usage with a commission merchants connected with the auctioneer, taking his note therefor, and some of the goods were afterwards sold at a less price than the broker was authorized to sell them for, it was held that the principal was bound by such act of the broker and that he could not maintain trover against the commission merchant. It was observed in this case, "Business to an immense amount has been transacted in this way, and the usage being established, it follows that when the plaintiff authorised his broker to sell, he authorised him to sell according to the usage; and when the defendants dealt with the broker even if they had known that goods were not his own, they had a right to consider him as invested with power to deal according to the usage."¹

Usage or custom, however, will not be permitted to contravene express instructions, and if the agent has been denied the power of delegation, usage cannot confer it.² Nor such usage or custom can justify the agent in violating the fundamental duties which he owes to his principal or change the intrinsic character of the contract existing between them.³

Where certain guardians of a union employed one K to prepare a specification for a workhouse, and K employed one M an architect to make calculations, the court decided that M having proved that K in employing him had acted in accordance with the custom of his trade of an architect, might sue the guardians for compensation.⁴ So a master of a ship has power by custom of trade, when seeking freight to employ

1. * See notes on page 293.

2. *Mechem*, §. 318.

3. *Lausatt v. Lippincott*, 9 Am. Dec. 440.

4. See *Katari* p. 106 and the authorities cited therein.

5. *Blackburn v. Mason*, 68 L. T. (N. S.) 510; *Robinson v. Mollett*, L. R. 7 H. L. 802.

6. *Moon v. Guardians Whistley Union*, (1837) 3 Bing N. C. 814=43 R. R. 802.

DELEGATION OF AUTHORITY BY AGENT

freight brokers for that purpose.¹ But where a certain firm consigned goods to one M upon a *del credere* commission for sale and drew bills on him in advance, which M accepted, but never paid, and afterwards without the knowledge of the firm placed the goods with H, another broker, upon a *del credere* commission and upon an agreement to divide the commission with him, and obtained his acceptances for the amount, Lord Ellenborough said: "There certainly was not any express privity between the firm and H, neither can any be implied unless the court had found that the usage of trade was such as to authorize one broker to put the goods of his employer into the hands of a sub-broker to sell and divide the commission with."²

Where a print-seller entrusted a mate of an East Indiaman with certain goods, to be disposed of by him in India, agreeing to take back, from the mate whatever he should not be able to sell, and allowing him what he should obtain beyond a certain price with liberty to sell them for what he could get if he could not obtain that price; and the mate not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in England, it was held that the delivery to the agent was within the terms of his agreement.³

It is to be noted that customs which modify contracts entered into between private persons are those which have prevailed so long and so uniformly in transactions between persons engaged in a particular occupation, that when two of such persons enter into a contract relating to their occupation, and not containing anything inconsistent with the custom, they are presumed to have contracted with reference to it, and it then forms a part of the contract so far as it is applicable.⁴

The exigencies of business do from time to time, render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule laid down in the maxim "*delegatus non potest delegare*" should be relaxed so as to enable the agent to appoint a delegate. So, if the nature of the act, or business entrusted to the agent requires that sub-agents should be employed to safe-guard the principal's interests or to perform the act or to carry on the business to his advantage, an authority to employ sub-agents will be implied.⁵ Thus, an agent employed to collect a debt by suit would be entitled to employ an attorney; or to sell goods by public auction, it would be necessary to employ an auctioneer; or where the power given by one party to another by an instrument in writing is of such a nature as to require its execution by a deputy, the party

Nature of business necessitating employment of a sub agent.

1. Story on Agency, § 14.

2. *Cochran v. Irlam*, 2 M. & S. 300 (306) note.

3. *Bromley v. Corwell*, 2 B. & P. 438.

4. See notes on pages 148 to 161.

5. See *Katlar*, p. 110 and the authorities cited therein. See also § 185, Indian Contract act, 1872.

originally authorised as agent may appoint a deputy.¹ Similarly, where a note or draft is sent to a bank or other agent to be collected at a distant place, the authority of the bank or other agent to employ a sub-agent at the place of collection and to forward the note or draft to him, would be presumed.² If a note be sent to a bank for collection and for the protection of the principal it becomes necessary to have a note protested, the authority of the bank to employ a proper officer for that purpose will be implied.³ An agent authorised to charter a vessel can employ a vessel broker to assist him in securing the charter.⁴

Where an agent, like the general manager of a large mercantile business or a district agent of an insurance company is given charge of a large territory or of an extensive business in a similar territory and is required to accomplish results which cannot reasonably be demanded from his individual and personal efforts, he will ordinarily be deemed to have implied power to appoint such sub-agents and assistants as the contemplated results reasonably require.⁵ For the same reason, where an agent's employment involves the performance of duties at various places which it is physically impossible for him to perform in person, he can employ sub-agents for that purpose.⁶ Generally an agent put in charge of an extensive business or a department of such business which can reasonably and properly be carried out only by the employment of assistants and subordinates, where no other arrangement is made, have implied power to appoint them.⁷

Lord Fitzgerald said : "I accept it, then, as settled law that although a trustee cannot delegate to others the confidence reposed in himself, nevertheless, he may in the administration of a trust fund avail himself of the agency of third parties, such as bankers and others, if he does so from a moral necessity, or in the regular course of business. If a loss to the trust fund should be occasioned thereby, the trustee will be exonerated, unless negligence or default of his led to the result."⁸ It has, however, been held that the directors of a company cannot delegate their powers of allotting share to any of their number.⁹

Where no discretion or skill required an agent may delegate authority.

Where no personal skill or discretion is requisite, an agent can delegate his authority. Mr. Justice Willes says :— "If a person is appointed to some function, or selected for some employment to which peculiar personal skill is essential—as a

1. See Pearson's Law of Agency, pp. 50, 51.

2. *Breck v. Meeker*, 68 Neb. 99.

3. *Tiernan v. Commercial Bank*, 40 Am. Dec. 83 ; *Holden v. Bank of Louisiana*, 45 Am. Dec. 72.

4. *Mechem*, § 316 ; *Saveland v. Green*, 40 Wis. 431.

5. *Boehm v. Exchange Ins. Co.*, 51 N. Y. 117 and other American authorities cited at p. 111 of Katiar's Law of Agency

6. *The Guiding Star*, 53 Fed. 936.

7. *Mechem*, § 317 and the authorities cited therein.

8. *Speight v. Gaunt*, (1883), 9 App. Cas. 1, at p. 29. See, however, § 47 of the Indian Trust Act, 1882, and *Titely v. Wolstenholme*, 7 Beav., 424. The rule laid down in *Speight v. Gaunt* is possibly a slight enlargement of the powers given under the Indian Trust Act, and this case would, in all probability be followed in this country in cases which do not fall under the Act.

9. *In re the Leeds Banking Co., Howard's case* (1866), 1 Ch. Ap. 561.

painter engaged to paint a portrait—he cannot hand it over to someone else to perform; but when the thing to be done is one, which any reasonably competent person can do equally well, or when any discretion to be exercised is in respect of a merely ministerial act, a deputy may be appointed." Accordingly, it was held that the steward of a manor may appoint a deputy to act as steward, and the deputy may do all that the steward himself could have done.

The disability of an agent to engage a sub-agent does not extend to acts which are purely of a ministerial or mechanical nature inasmuch as the reason on which it is based does not exist in such cases and the authority to employ sub-agents for such acts is generally implied.¹ So an agent empowered to execute a promissory note or to bind his principal by an accommodation acceptance or to sign his name to a subscription agreement or to execute a deed, having himself first determined upon the propriety² of the act, may direct another to perform the mechanical³ act of writing the note or signing the acceptance, subscription or deed and the act so performed will be binding on the principal.⁴ So also an agent authorised to sell real estate, who exercises his own discretion as to the price and the terms, may employ a sub-agent to find out a purchaser,⁵ or to point out the land to an intending purchaser.⁶ Sir John Romilly observed in a case:—"It is undoubtedly true, that an agent cannot delegate his authority to another; but I apprehend it to be equally clear, that an agent is entitled to perform, and must necessarily perform, a great number of his acts and functions through the aid of persons to whom he delegates his authority. Those for instance when a merchant receives goods from abroad for sale, and he deposes his foreman to go to the proper place for selling such goods, and the foreman sells them accordingly; in that case, it would be impossible for the consignor to say, that the sale was void, because the merchant did not personally sell them, but employed another person for that purpose, for whom the sale was affected. The merchant would no doubt be answerable for all the acts of his foreman but provided the acts done were proper and within the scope of his authority, they would be the acts of the merchant himself."⁷

Ministerial
and mechanical
acts.

Where an agent is authorised by his principal to underwrite any policy of insurance not exceeding a particular amount and to subscribe his name to it and settle and adjust losses, although he cannot delegate his whole authority to another, yet having himself approved a policy of insurance and signed a slip for it showing such approval, the policy itself may be signed by his clerk in pursuance of the slip, as it is purely a ministerial act, which the agent can authorise any other person to do.⁸ So,

1. *St. Margaret's Burial Board v. Thompson*, (1871), L. R. 6 Q. P. 457.

2. *Parker v. Kett*, (1701), 1 Ld. Raymond, 658.

3. *Mechem*, S. 315; *Halsbury*, Vol. I, (2nd Edn.), Art. 387, p. 224.

4. See *Kattar*, p. 112 and the authorities cited therein. See *Mechem*, S. 315.

5. *Rensick v. Bancroft*, 56 Iowa 527.

6. *Mc Kinnon v. Vollmar*, 75 Wis. 82.

7. *Rossiter v. Trafalgar Life Assurance Association*, 27 Beav., 376.

8. *Mason v. Joseph, Smith* 408.

where in consequence of damage to a ship during the voyage it becomes impossible to prosecute the adventure, the master has authority to sell for the benefit of parties interested, and the person employed by him to superintend the sale may lawfully be offered the proceeds to him or his order.¹ So an attorney must necessarily authorise his clerk to receive moneys and to do acts for him in his name in the ordinary course of business and all such acts are valid and binding on the client as well as on the attorney.² Similarly, in *Dew v. Metropolitan Railway Co.*,³ it was held that where a county solicitor was authorised to renew a lease of the premises in London, he could delegate his authority to a London agent and the latter could engage a land agent for the performance where the county solicitor continued to exercise his discretion and the delegation was purely of a ministerial or mechanical nature.

Merely subsidiary acts, which involve no discretion may be delegated. So, where a principal gave a power of attorney to his agents to draw bills in his name, it was held that where the agents might themselves have drawn the bills they could authorise their clerks to draw them, an act of drawing being merely ministerial.⁴ So an authority to endorse certain bills in the principal's name may be delegated because such acts are purely ministerial and involve no discretion.⁵

Authority
to employ
subagents
arising from
unforeseen
emergencies.

There may arise cases in which sudden emergency or supervening necessity may justify the employment of sub-agent and an instance of this is where a railway train while running is suddenly deprived of his fireman or brakeman, the conductor may employ any one else to fill the place until the necessity is met or the Company could make the appointment.⁶ The same rule applies where the conductor is himself incapacitated and delegates the conduct of the train to another servant or even to a competent stranger.⁷ But this power to employ a sub-agent in case of emergency exists only in those cases where the principal cannot communicate with and his instructions cannot be obtained in time to prevent loss to the affairs of the agency. In *Gwilliam v. Twist*⁸ it was held that neither the driver nor the conductor of an omnibus could delegate the driving of it to another (in that case to another conductor). It was apparently admitted by the Court of Appeal that if there had been any urgent necessity the duty to drive could have been delegated but the Court of Appeal held there was in fact no necessity as the bus might have been left where it was until the owner had been communicated with. The same principle is adopted in Chancery in cases as to powers; for instance, where a power has been

1. *Ireland v. Thompson*, 4 C. B. 149.

2. *Hemming v. Hale*, 29 L. J. C. P. 137.

3. 1 T. L. R. 358.

4. *Ex parte Sutton* (1788), 2 Cox, 84.

5. *Ibid*; See *Katlar*, p. 113 and the authorities cited therein. See also *Exp. Birmingham Banking Co.*, (1868) L. R. 3 Ch. 651; *Griffiths v. Williams*, 1 T. R. 710;

6. *Georgia Pac. Co., v. Propst*, 85 Ala. 208.

7. *Mechem*, §. 320.

8. 2 Q. B. 84=(1894), 11 T. L. R. 415.

given to a father to appoint amongst his children a delegation of this power to his wife has been held bad.¹

This salutary principle, however, does not appear to have been always recognized in American cases. To quote from *Kattar*,² "this doctrine of emergency has also been resorted to in several instances to support the employment by a servant to some one to assist him in some sudden exigency arising during the performance of the service, Master was held responsible, on this ground, for the negligence by a by-stander requested by the driver to assist him in repairing the cart which had been broken down on the street. "We think" observed the court, "that the act by by-stander must be regarded as the act of the driver. The cart was out of order and the driver was trying to fix it as he was bound to do. For that purpose he asked the by-stander to assist him and in doing so he used the assistance of the by-stander as would have used a tool or an appliance which he had procured and which he must be regarded as having implied authority to procure under the circumstances. The fact that the tool or an appliance was an intelligent human being does not affect the matter any more than the fact that another person held the reins, in *Booth v. Mister*.³ "

The case is not one where the servant admitted to delegate his duties to another as in *Guilliam v. Twist*,⁴ but a case where the driver needed for a moment, in the performance of his duties in a sudden emergency, another hand and found it in the assistance given at his request by a stranger, and what was done by a stranger was as if done by himself. Where an order was made for payment of a sum of money out of court to a lady who was appointed an attorney for certain purpose in America, the *cestuis que trust* of the fund and the lady being too ill to attend personally to receive the money, the solicitor in the case was allowed by her to receive it on her account, her receipt being given for it and her signatures thereto verified by affidavit, the court held that the lady was justified by the sudden emergency⁵ that had arisen by her illness to employ the solicitor as sub-agent.

Where the principal knows at the time of making the appointment of the agent that he will employ a sub-agent, and makes the appointment with such knowledge, he has no cause for complaint if the agent subsequently employs a sub-agent.⁶ If the employment of a sub-agent was contemplated by the parties at the time of the creation of the agent's authority; or if it was then expected that sub-agents might or would be employed, this would be treated as at least implied authority for such employment.⁷ The sanction of the delegation may also be evident from the conduct of the parties, as where on the

Agent's intention to appoint a sub-agent known to the principal at the time of his appointment; acquiescence of principal.

1. *Chatter v. Chadwick* (1842), 13 Sim. 102.

2. *Law of Agency*, pp. 108, 109.

3. 7 C. & P. 66

4. 2 Q. B. 84.

5. *Holland v. Harper*, 20 L. T. 218.

6. *Quebec etc., Ry. Co., v. Quinn*, 12 Moo. P.C. 282; *Dow v. Met. Ry. Co.*, 1 T.L.R. 358.

7. *National Steamship Co., v. Sheehan*, 10 L. R. A. 782; *De Bussche v. Alt.* 8 Ch. D. 288.

sale of a ship in Japan through a sub-agent it was shown that the principal had acquiesced in his employment.¹

The fact that the employment of sub-agents was contemplated by the parties need not be shown by express proof. The nature of the service, the place at which it is to be performed, the distance between the place of appointment and the place of performance and similar other circumstances, which reasonably lead to an inference that the employment of sub-agents was in contemplation, may be taken into account. In *Eastland v. Maney*² where the principal and agents were both residents of California and the agency was to sell land in Texas, the Court observed: "It is a fair presumption growing out of the exigencies of the transaction that it was contemplated that a purchaser should be obtained through a sub-agent." Again, where an agent appointed to sell land of small value, was a busy man of large affairs living at some distance from the location of the land, the Court held that the principal must have known that he would not personally act for her in such unimportant matter and that action through a sub-agent must have been contemplated.³

An English contractor for a railway in Canada, who was not known to be personally undertaking the work, was held entitled to engage an agent.⁴ And where there is a ratification by the principal of the acts of the sub-agent, the latter becomes jointly liable with the agent to the principal.⁵

Law in
India: when
agent
cannot
delegate.

An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally unless by ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent, must, be employed.

(S. 190, Indian Contract Act, 1872).

It is to be observed that section 190 of the Indian Contract Act does not appear to recognize the presumption of a person undertaking any sub-agency, but requires such undertaking to be expressed or implied to prevent the agent from employing a sub-agent. If it is not clear from the contract of agency or from the nature of an agent or from circumstances under which it is to be executed that the agent undertook to perform such contract of agency personally, there is nothing to prevent him from employing an agent. It is only when there is personal undertaking when we are to see whether the employment of a sub-agent is justified within the two exceptions herein laid down, namely, where by the ordinary custom of trade a sub-agent may, or from

1. *De Bussche v. Alt*, (1878) 8 Ch. D. 286, C. A.

2. 36 Tex. Civ. App. 147.

3. *Wright v. Isaacks*, 43 Tex. Civ. App. 228. But the reason of the rule does not exist and the rule, therefore, does not apply where the agent to sell land, although he does not live in the place where the land is, has been in the habit of visiting that place from time to time in connection with the management and leasing of the land, *Williams v. Moore*, 34 Tex. Civ. App. 402. See *Katlar*, p. 107.

4. *Quebec & Richmond Rail Co., v. Quinn*, (1858), 32 Moo. P. C. C. 232.

5. *Kear v. Fenwick* (1876), 1 C. P. D. 745, C. A.; *Dow v. Metropolitan Rail Co.*, (1885) 1 T. L. R. 368, C. A.

the nature of the agency a sub-agent must be employed. This would mean that when the agent has expressly or by implication undertaken to perform his contract of agency personally, he cannot go behind such undertaking merely because the custom of trade authorises him or the nature of the agency empowers him to employ a sub-agent. These are the things of which the law will presume knowledge to the agent at the time when he entered into the contract and if he chose to undertake the performance of the contract of agency personally in respect of them, there is no principle of law or equity which will justify his performance through another person. If by contract of agency, either expressly or impliedly the agent has been denied the power of delegation neither the custom or usage nor the nature of agency confer it. The proposition laid down by the Indian Legislature thus appears to conflict with the first principle of the law of contract which can never be the intention of the legislature. There appears to be no decided case in India on this point in which a different note was struck and in the absence of such case-law we are justified in following the principle laid down above by the English Law although the defective phraseology of section 190 of the Indian Contract Act pointed above makes their application to India doubtful.¹ "

49. Relations between principal and sub-agent.

A 'sub-agent' is a person employed by, and acting under the control of, the original agent in the business of the agency.

Sub-agent
defined.

(S. 191, *Indian Contract Act, 1872*).

The relation of the sub-agent to the original agent is as between themselves, that of agent to principal. "It may be generally stated that, where agents employ sub-agents in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations, and are bound to the same duties, in their immediate employers, as if they were the sole and real principals".² Accordingly, it has been laid down under the English law that 'there is no privity of contract between a principal and sub-agent as such whether the sub-agent was appointed with the authority of the principal or not; and the rights and duties arising out of the contract between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto.³ Provided that, the relation of principal and agent may be established by an agent between his principal and a third person, if the agent is expressly or impliedly authorised to constitute such relation, and it is the intention of the agent and of such third person that such relation should be constituted".⁴ Where a sub-agent is appointed without the authority, express or implied, of the principal, the principal is not bound by his acts.⁵

1. See Katir, pp. 104, 105.

2. Story on Agency, §. 386.

3. Bowstead, Art. 48, p. 87, and the authorities cited therein.

4. *Ibid.* See also Halsbury, Art. 392, p. 227.

5. *Ibid.*

Under the English law, therefore, there may be said to be three classes of sub-agents: (1) those employed without the authority, express or implied, of the principal, by whose acts the principal is not bound, (2) those employed with the express or implied authority of the principal, but between whom and the principal there is no privity of contract; (3) those employed with the principal's authority, between whom and the principal there is privity of contract, and a direct relationship of principal and agent is, accordingly, established.¹ In the first two cases the agent is responsible to the principal for the acts of the persons engaged by him but in the last case he is not responsible for their acts, they being directly responsible to the principal for them.² In the first two cases the persons engaged are not directly responsible to the principal for their acts, except for fraud and wilful wrong in the second case, while in the third they are directly responsible to the principal.³ In the first two cases they must look to the agent who employed them as their principal for their remuneration and indemnity while in the third it is the original principal to whom they must look for them in the first instance.⁴

Indian Law: representation of principal by sub-agent properly appointed.

Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Agent's responsibility for sub-agent.

The agent is responsible to the principal for the acts of the sub-agent.

sub-agent's responsibility.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

(S. 192, *Indian Contract Act*, 1872).

Agent's responsibility for sub-agent appointed without authority.

Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

(S. 193, *Indian Contract Act*, 1872).

Relation between principal and person duly appointed by agent to act in business of agency.

Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

1. Halsbury, Art. 892, p. 227.
2. See Mechem, Sections 326—329.
3. *Ibid*, Bowstead, Art. 43, p. 87.
4. *Ibid*; *Schmailing v. Tomlinson*, Taunt, 147.

ILLUSTRATIONS

- (a) A directs B his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.
- (b) A authorises B, a merchant in Calcutta to recover the moneys due to A from C & Co., B instructs D, a solicitor, to take legal proceedings against C & Co., for the recovery of the money. D is not a sub-agent, but is solicitor for A.

(S. 194, Indian Contract Act, 1872).

Where authority to appoint a sub-agent in the nature of a substitute for the first agent 'exists' either by agreement or as implied in the nature of the business "and is duly exercised, privity of contract arises between the principal and the substitute and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he has been appointed agent by the principal himself." ¹ This is the class of cases contemplated in Section 194 of the Indian Contract Act, 1872. In this case, a ship was consigned to A, an agent in China, for sale, a minimum price being fixed. A, with the knowledge and consent of the principal, employed B to sell the ship. B, being unable to find a purchaser, bought the ship himself at the minimum price, and subsequently resold her at a large profit. It was held that privity of contract existed between the principal and B, and that B was liable to account to the principal for the profit made in the re-sale.

When there is privity of contract between the principal and the sub-agent—substituted agent

Authority to appoint sub-agent does not bring the case within the purview of this section for under it the agent has not to prove that he had authority either express or implied to delegate his own duties to another person to act for the principal in the business of the agency which stands altogether on a different footing than the ordinary delegation of duties to another. ² The true test to determine whether the person appointed by an agent authorised in that behalf to perform part of the business of the agency is a substituted agent of the principal or the sub-agent of the agent is to see if there is a privity of contract between the principal and the person so appointed, and the test to be applied is the same whether the case falls within Section 194 or whether the person so appointed is nominee of the principal, although there is difference in the obligation undertaken by the agent, for Section 195 applies to a case falling within Section 194 while in cases where the substituted agent is the nominee of the principal, the agent is not concerned with the character or the efficiency of the person so appointed, and his obligation quoad the part of the business of the agency entrusted to the substituted agent ceases if and so soon as privity of contract has been created between the substituted agent and the principal. ³ Where a person appoints one branch of a bank as his

1. *De Bussche v. Alt* (1877), 8 Ch. D. 286, 311, See also *Powell v. Jones*, (1905), 1 K. B. 11.

2. *Mercantile Bank v. Chetumal*, 1930 Sind 247=128 I. C. 473.

3. *Choudhury T. C. & Bros., v. G. M. Neogi* 1930 Cal. 10=56 Cal. 686=121 I. C. 636; English cases ref. to.

agent for the purchase of certain goods and that bank instructs another branch of the same bank to pay for and take delivery of the goods for such person, the latter branch becomes a substituted agent of the person and is bound to carry out all the instructions of the principal in respect of the transaction. ¹

It has been held that shipowners would be *prima facie* liable for damage caused by bad stowage or improper or insufficient dunnage and their liability would not be modified by a clause in the charter-party empowering the charterers to name the stevedores, as the stevedores were the agents and paid servants of the shipowners for the purpose of discharging the duty of the shipowners in loading the cargo. ²

It will thus be clear that the mere fact that the agent was expressly or impliedly authorised to employ another does not affect the question, but we are to see whether the agent was authorised to employ him as his own assistant or agent or as the assistant or agent of the principal. To create this privity of contract between the principal and the person employed it is not sufficient that the principal has consented to the appointment inasmuch as the principal may consent to the appointment of a person as his own agent or as agent's agent.

Consent to delegate is not the same as the consent to substitute and it is only the latter which creates privity of contract. So in a case where the question was as to the liability of a factor for the defaults of another to whom he had sent the goods for sale the latter contended that if the principal told him to "do with the goods as with his own" or if "the employment of a sub-agent was necessary and that fact was known to the principal" then in either case the factor had a right to send the goods to another factor of good credit, to whom and not to him, the principal must look for their disposal. But the Court said, "We do not think that if the jury had found both of these facts in favour of defendant it necessarily followed that he should not be liable for the default of the person selected. The inquiry still remained, was the person selected as the servant of the agent or factor; or did he become the agent of the principal? It by no means follows, where produce, for instance, is entrusted to a commission merchant in Dubuque, and sent forward by him to his correspondent or agent at Chicago or St. Louis, that a privity of contract exists between such correspondent and the principal, to the extent that the original factor is released and the sub-agent only is liable. Nor does it make any difference that the principal or consignor knows that it must and will be sent forward to find a market. He has a right to, and is presumed to repose confidence in, the financial ability and business capacity of the person so employed, and if such factor employs other persons, he does so upon his own responsibility, and having greater facilities for informing himself and extending

1 *Jayprasad V. Chartered Bank of India*, 1929 Lah. 536=120 I. C. 284, 1927 Lah. 562 reversed.

2 *Bombay and Africa Steam Nav. Co V Haji Azum*, 41 Bom. 119

his business relations, upon him and not upon his principal, should fall the loss of any negligence or default. If, however, another person has been substituted who with the knowledge and approbation of the principal, takes the place of the original factor, or if such substitution is necessary from the very nature of the business and this fact is known to the principal, the liability of the substitute may be direct to the principal, depending upon questions of good faith and the like on the part of the factor in selecting the substitute".¹ Similarly, where a principal employed an agent to send goods to Amsterdam market and there to dispose of them and it was acknowledged that the employment of some sub-agent was in the contemplation of the parties but yet that the principal dealt only with the agent and relied upon him, it was held that the sub-agent could not claim commission from the principal directly.²

Consequently, wherever there is a question of the privity of contract such question always resolves itself into—whether the principal consented to the appointment of the sub-agent as his own agent or only as agent's agent—the determination of which is not always easy. Where such consent is given expressly the question becomes one of interpretation only of the terms in which it is couched, but in ordinary cases it is not expressly given and the extent of it is usually to be determined from the facts and circumstances of each case. In order to justify an inference of an employment as the principal's agent, the circumstances must be such as to necessarily warrant the conclusion that the principal has taken the sub-agent as his agent, and thereby, ordinarily, becoming liable for his compensation, assuming responsibility for his conduct, accepting the sub-agent's responsibility to him, and releasing the original agent from such responsibility.³ Whether the principal has done so is, ordinarily, a question of fact to be determined from the facts and circumstances of each case.⁴

The upshot of the above discussion thus is that the whole question hinges upon the fact whether the person employed is employed by the agent to act as his agent to assist him in the discharge of his duties to the principal or to act as the agent of the principal in some part of the business apart from or along with or even as a substitute for the original agent. In the former case the agent acts as the principal in making a contract of agency with such person while in the latter case he acts only as the agent of the principal in affecting contractual relation of agency between the principal and such person. In the former case there is no representation of the principal the agent himself acting as principal while in the latter case the principal is represented by the agent in affecting the contract of agency with the person engaged. In the former case there is no contractual relation established between the principal and the person employed while in the latter case there is one, although in either

1. *Loomis v. Simpson* 13 Iowa, 532; see also *Schmaling v. Tomlinson*, 6 Taunt, 147.

2. *Schmaling v. Tomlinson*, *ubi sup.*

3. *Mechem*, §. 330.

case it is the agent who makes the contract. So in the former case there is no privity of contract between the principal and the person employed while in the latter case there is.

Thus, if from the circumstances of a particular case, it appears that the agent employed the sub-agent for the principal and by his authority, expressed or implied, then the sub-agent is the agent of the principal and there is privity of contract between them, all the rights and liabilities to each other being the same as those of the principal and agent.¹ While, on the other hand, if the agent, having undertaken to transact the business of his principal employs a sub-agent on his own account to assist him in what he has undertaken to do, even though he does so with the consent of the principal, he does so at his own risk and there is no privity of contract between such sub-agent and the principal, the sub-agent being agent of the agent only.² In this case, a factor, employed to sell goods as *del credere* agent, employed a broker with the principal's authority, for their sale and the broker sold the goods, and received the proceeds and made payments on account to the factor from time to time but while the balance of the goods was still in his hands, the factor, who was indebted to the broker in respect of other independent transaction became bankrupt. It was held that there was no privity of contract between the principal and the broker and hence the latter was not liable to the former for the proceeds of the goods sold or even for the balance in his hand without a set off of his debts due to him from the factor even though the broker had reason to believe that the factor was not the owner of the goods but was acting only as an agent. In *Lockwood v. Abdy*,³ a sub-agent, appointed by the agent to manage the principal's affairs, took over the entire management thereof and communicated directly with the principal. In spite of this fact it was held that there was no privity of contract between the principal and such sub-agent and, therefore, the latter was not liable to render account to the former. Of course, where the employment of the sub-agent is clearly without knowledge or consent of the principal there is no question of privity of contract inasmuch as there is not even possibility of its existence in such case.⁴

Section 194 of the Indian Contract Act apparently means to draw a clearly marked line between an ordinary sub-agent and a person who is put in relation with the principal a "substitute" as he is called in a passage already quoted above.⁵ The distinction is probably convenient, though we cannot find it so sharply defined in any English authority. Apparently, this section covers the case of an upper servant in a household who has authority to select and dismiss under-servants, although

1. *De Bussche v. Alt*, (1877) 8 Ch 286 cited at p. 305.

2. *New Zealand & Australian Land Co., v. Watson*, 7 Q. B. D. 374. See however *Blackburn v. Mason*, 68 L. T. 510.

3. 14 Sim. 437, see also *Cartwright v. Hateley*, 1 Ves. Jun. 292.

4. *Schmaling v. Tomlinson*, 6 Taunt. 147; *Wray v. Kemp*, 26 Ch. D. 169

5. *De Bussche v. Alt* (1877) 8 Ch D 310, 311.

the language is perhaps not the most appropriate. Such a servant, at any rate, is not answerable to third persons for acts or defaults of those under him which he has not specifically authorized.¹

A receiver appointed to carry on a business by mortgagees, trustees for debenture-holders, or the like, appears to be in a similar position,² though it by no means follows that those who appoint him under the special powers conferred on them for that purpose, whether by law or by agreement of parties, are liable as principals for his acts.³ In Bombay, the appointment of a muccadam by a commission agent acting for an up-country constituent is an ordinary case of the appointment of a sub-agent. The muccadam is not a substituted agent of the up-country constituent.⁴

In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty
in naming
such person

ILLUSTRATIONS.

- (a) A instructs B, a merchant, to buy a ship for him. B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy, and is lost. B is not but the surveyor is, responsible to A.
- (b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

(S. 195, *Indian Contract Act, 1872*).

This section and section 194, read together, show that they do not apply to the case of an agent being instructed to hand over all or part of the business to a certain named person and no other; in such case he is not answerable for the capacity or conduct of that person; his duty is done when he has established relations between the substituted agent and the principal, and then Ss. 191 and 192 have no place.⁵

Where a sub-agent is *properly* appointed, the principal is so far as regards third person, represented by the sub-agent and

When the
principal is
bound by
the acts of
a sub-agent.

1. "It was never heard of that a servant who hires labourers for his master was answerable for all their acts". *Stone v. Cartwright* (1795) 6 T. R. 411=3 R. R. 220. See Pollock & Mulla, p. 551.
2. *Owen & Co., v. Cronk* (1895) 1 Q. B. 265 See per Lord Esher at p. 272.
3. *Gosling v. Gaskell* (1897) A. C. 575.
4. *Nensukhdas v. Birdichand* (1917) 19 Bom. L. R. 948, 960=43 I. C. 899; As to a *dubash*, in *Madras, South Indian Industrials Ltd. v. Minda Rama Jogi* (1914) 27 Mad. L. J. 501=26 I. C. 822.
5. *T. C. Chowdury & Bros., v. Girindra Mohan Neogi* (1942) 56 Cal. 686=121 I. C. 636.

is bound by, and responsible for, his acts, as if he were an agent originally appointed by the principal.¹ But where a sub-agent is appointed without authority, express or implied, the principal is not represented by, or responsible for, the acts of the sub-agent.² Thus, if A employs B to transport goods to a foreign market, and B, without A's knowledge or consent, delegates his entire employment to C, there is no privity of contract between A and C, and A is not liable to C for his charges, even if he has not paid B for the services rendered.³ Similarly, if a factor delegates his employment without the authority of the principal, the sub-agent has no lien for duties, etc., paid by him, as against the principal.⁴ So also, if A authorises B, a ship-broker, to receive payment, B cannot delegate the authority and if he professes to do so, A is not bound by the payment of the freight to the sub-agent.⁵ If money due to A is paid to P, who is Z's servant, Z having authority from A to collect it, P is accountable only to Z, and A cannot recover the money direct from P.⁶ But a sub-agent is accountable to the principal for a secret commission improperly received by him.⁷

It is thus clear that wherever there is a question of liability of the principal to third persons on account of an act of a sub-agent the question whether such sub-agent was properly appointed or not is to be examined. What is the meaning of "properly appointed"? Does it refer to the class of cases contemplated in S. 194 of the Indian Contract Act only⁸ or to the general provisions relating to the appointment of agents as are contemplated in Chapter IV?⁹ Of course, even as regards the appointment of a sub-agent by the agent, the provisions contained in Chapter IV will apply, but in order to bind the principal, it also seems essential that the principal should have given consent, express or implied, to the appointment of such sub-agent. If the sub-agent purports to act in the name of the ultimate principal, that principal may adopt his acts by ratification, as he might adopt acts purporting to be done on his behalf by any other person. But it is conceived that, if a sub-agent acts in his own name or in that of the agent who has taken on himself without authority to delegate to him business which is in fact the principal's the acts so done cannot be ratified by the principal.¹⁰ Knowledge of the facts and voluntary acts are as much essential here as in other cases of ratification, and the principal by merely accepting what he was entitled to from the agent, in ignorance that a sub-agent had been employed, does not ratify the appointment.¹¹

1. S. 192, Cl. 1, Indian Contract Act, 1872, cited at p. 304

2. S. 193, Indian Contract Act, 1872, cited at p. 304

3. *Schmaling v. Tomlinson*, (1895), 6 Taunt 147

4. *Nolley v. Rathbone*, (1814), 2 M & S 298.

5. *Dunlop v. De Maurrieta* (1886), 3 T L R. 166, C. A.

6. *Stephens v. Budoock* (1832), 3 B. & Ad. 354.

7. *Powell v. Jones* (1905) 1 K. B. 11, C. A.

8. See Pollock & Mulla p. 548.

9. See Katiar, p. 121.

10. See Pollock & Mulla, p. 550.

11. See Katiar, p. 121, and the American authorities cited therein.

Likewise, a sub-agent who does not know that his employer is an agent is entitled to the same rights as any other contracting property dealing with an undisclosed principal.¹ "If A employs B as his agent to make any contract for him, or to receive money for him, and B makes a contract with C, or employs C as his agent, if B is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C to be acting as an agent for any one, A cannot make a demand against C without the latter being entitled to stand in the same position as if B had in fact been a principal. If A has allowed his agent B to appear in the character of a principal he must take the consequences"² Accordingly, where goods consigned have been sold in good faith by a sub-agent appointed by the consignee, and the proceeds have been brought into account between the consignee and the sub-agent, the latter is not liable to account to the consignor. His account with the consignee cannot be interfered with by the consignee's principal except on the ground of bad faith.³

Except where privity of contract is established and the sub-agent thus becomes the agent of the principal, in all other cases the agent is responsible to the principal for the acts of the sub-agent.⁴ Authority to appoint sub-agents to carry through the transactions does not indicate that the agents are discharged from their liability to the principals for the acts of sub-agents.⁵ Thus every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use, and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment.⁶ Where a person, employed to receive money for another, employs a third person to receive it for him, proof of the money having come to the hands of such third person is sufficient to charge the person who employed him with receipt⁷ and the mere fact that the employment of such third person by the agent was known to the principal does not affect the agent's liability.⁸ If the sub-agent converts the goods entrusted to his own use, the agent is responsible to the principal for the damage caused by such conversion,⁹ although the principal has a right to follow goods in his sub-agent's hand if he misappropriates them.¹⁰ The agent is also liable to the principal

Agent's responsibility for sub-agent — to the principal.

1. See Ss. 231, 232, Indian Contract Act, 1872, *infra*.

2. Bowen L. J. in *Montagu v. Forwood* (1893) 2 Q. B. 350, 355 Cp. *New Zealand & Australian Land Co. v. Watson* (1881) 7 Q. B. D. 374.

3. *Peacock v. Baijnath*, (1891) 18 I. A. 78, at p. 109—18 Cal. 573, 613.

4. Ss. 192 and 193, Indian Contract Act, 1872, cited at p. 305.

5. *Mercantile Bank v. Chetumal*, 1930 Sind 247—126 I. C. 473.

6. *Hugh Francis Hoole v. Royal Trust Co.*, 1930 P. C. 274—127 I. C. 529.

7. *Mattheus v. Haydon*, 2 Esq. 509, *Mackernay v. Ramsays Bonars & Co.*, 8 E. R. 628; *Skinner & Co. v. Wexelman, Eddowes & Co.*, 1882 C. & E. 12; *Mutual & Per. Ben Bud. Society Exp. James*, 49 L. T. 530.

8. *Skinner & Co. v. Wexelman, Eddowes & Co.*, 1882 C. & E. 12.

9. *Majestain v. Eastern Agency Co.*, 1 T. L. R. 595.

10. *New Zealand and Australian Land Co. v. Warton*, 7 Q. B. D. 374.

for the loss occasioned by the negligence of the sub-agent as if such negligence were committed by the agent himself.¹ If the appointment was unauthorized, the agent is not even entitled to set off remuneration of the sub-agent against such loss.²

In *Sekunder v. Nocerri*,³ the plaintiffs and the defendants carried on business in the same place, and when a member of either firm was sent to Calcutta to make purchases, the other firm took advantage of the opportunity to get the same person to purchase goods on their behalf. A member of the defendant's firm who was sent to Calcutta, through his own negligence, lost a sum of money given by the plaintiffs to the defendant's firm for the purchase of goods. The lower court found that the defendants acted as agents. It was held that the defendants, firm and not only the particular member of the firm by whose negligence the money was lost were responsible.

To third
persons.

It is to be observed that if the appointment of the sub-agent is unauthorized, the agent only is responsible for the acts of the sub-agent to the person with whom he deals inasmuch as the principal is not represented in such case and is, therefore, not responsible for the acts of the sub-agent.⁴ But if the appointment was authorised the agent is not responsible to third persons for the acts and contracts of the sub-agents inasmuch as the principal is sufficiently represented⁵ by the sub-agent in such case and is himself responsible for them.

Agent's
responsi-
bility for
sub-agents.

As already observed, there is no privity of contract between the principal and the sub-agent *as such*, whether the sub-agent was appointed with the authority of the principal or not, and the rights and duties arising out of the contracts between the principal and the agent and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto.⁶ The appointment of a sub-agent with the implied authority of the principal does not *ipso facto* indicate that thereby a privity of contract was established between the principal and the sub-agent and that the agents were discharged from liability to the principals for the acts of the agents.⁷ A sub-agent is not responsible for his acts to the principal except in case of fraud or wilful wrong.⁸ So a suit for account is not maintainable by the owner against a *tehsildar* who was appointed by a Receiver to the estate. The *tehsildar* is a sub-agent for the Receiver who may be regarded as an agent of the principal, the owner, and as sub-agent he is liable to render accounts to the Receiver

1. *Mitchel v. Mitchel*, 54 L. J. Ch 342

2. *Beaslo v. Dookerson*, 1 T. L. R. 564.

3. 11 C. L. R. 517

4. S. 193, Indian Contract Act, 1872, see also *Rhodes v. Robinson*, 3 Bing. N. C. 677.

5. S. 192, Indian Contract Act, 1872, *Slone v. Cartwright*, 6 T. B. 411.

6. See *South Indian Industries v. Mirdi Rama Jogi*, 27 Mad. L. J. 501. See also *Mercantile Bank v. Chetumal*, 1930 Sind 247=126 L. C. 473

7. *Mercantile Bank v. Chetumal* 1930 Sind 247=126 L. C. 47.

8. S. 192, Indian Contract Act, 1872.

and not to the principal.¹ So an agent appointed by the administrator of an estate as such cannot be proceeded against on such contract of agency by the person entitled to the estate, and it makes no difference that the administrator obtained the grant as the attorney of the mother and guardian of the person entitled.² On the same principle, when an account of the sale proceeds of the goods consigned has been settled between the consignee and his banian, it cannot be interfered with by the consignee's principal except on the ground of bad faith.³

A commission agent for the sale of goods, who properly employs a sub-agent for selling his principal's goods, is liable to the principal for the sub-agent's fraudulent disposition of the goods within the course of his employment. The last clause of section 192 of the Indian Contract Act giving a principal in cases of fraud or wilful wrong the right of recourse to the sub-agent does not exclude the principal's normal right of recourse to his agent. In fact, the total effect of the section is to give an option to the principal where a fraud or wilful wrong is committed by the sub-agent.⁴

Where a sub-agent sued the principal for his remuneration, the court held that the proper person to be sued was the agent who employed him and not the principal.⁵ The same rule applies as regards indemnity,⁶ freight and other expenses,⁷ and loss for breach of duty.⁸

So also, generally a principal has no claim against sub-agent for the moneys in the latter's hand, he being responsible for them only to the agent.⁹ But a distinction has been drawn between the cash and goods or their proceeds and it has been held that although a sub-agent is not responsible to the principal generally for the money that comes to his hand, where the agent who is employed by the principal to receive or collect it employs the sub-agent to do so, yet where goods are made over to the agent for sale or for any other purpose and the agent makes them over to the sub-agent for the same purpose, the principal has a right to follow the goods in the sub-agent's

1. *Jotindra v. Rajendra*, 8 Cal. L. J. 114=12 C. W. N. 1035. See also *Banwari Mukund v. Promothanath*, 1 L. R. 1937 (2) Cal. 124.

2. *Chidambaram y. Pitchappa*, 30 Mad. 243.

3. *Peacock v. Baijnath*, 18 Cal. 573, 613.

4. *Nensukhdas v. Birdichand* (1917) 19 Bom. L. R. 948=43 I. C. 699. The agent in the case was commission agent acting for an up-country constituent and the sub-agent was a muncadani employed by the commission agent. As to the position of a *dubash* in Madras, see *South Indian Industries, Ltd. v. Minda Ram Jogi* (1914) 27 Mad. L. J. 50=26 I. C. 822.

5. *Cull v. Backhouse*, 6 Taunt 149; *Carlisle & Cumberland Banking Co., v. Broggy*, (1911) 1 K. R. 489; *Levis v. Clay* 37 L. J. Q. B. 324.

6. *Per Montague J. in Southern v. How*, 123 E. R. 1248; *Backworth v. Ellerman*, 6 N. & N. 605.

7. *Selley v. Rathbone*, 2 M. & S. 298; *Schmalting v. Tomlinson*, (1815) 6 Taunt. 147.

8. *Servies v. Bain*, 9 T. L. R. 95.

9. S. 192, Indian Contract Act, 1872.

hand and he can also recover the proceeds thereof as his property,¹ unless the agent has no knowledge that they belonged to the principal and dealt with them bona fide as the agent's property.² In such case, however, if the appointment of the sub-agent was authorized he can claim a set off for his services and for the proper expenses incurred by him in connection with the goods delivered to him.³

Principal's
right to sue
a sub-agent.

From what has been stated above, it is clear that there are three exceptions to the general rule that a sub-agent is responsible to the agent and not to the principal. Firstly, when there is privity of contract established between the principal and the sub-agent, as for instance, in cases falling under Section 194 of the Indian Contract Act, the sub-agent becomes as responsible to the principal for the due discharge of the duties which employment casts upon him as if he had been appointed agent by the principal himself.⁴ Secondly, on the ground of title where goods or property is entrusted to the agent by the principal and the agent entrusts it to the sub-agent, the principal is entitled to follow the goods or property or their proceeds which are in the hands of the sub-agent in the same manner as he would be entitled to if they were in the hands of the agent.⁵ Thirdly, on the ground of fraud or wilful wrong. Where a sub-agent has been guilty of any fraud or wilful wrong which causes any loss to the principal, the principal can sue the sub-agent for recovery of such loss and the plea that there is no privity of contract between the sub-agent and the principal will not bar such suit.⁶ Thus, where agents employed for commission to procure an advance of money for their principals, employed for that purpose with the assent of the principals, a sub-agent, on the footing that he should share the commission with them and where the sub-agent being aware that the agents were acting for the principals succeeded in procuring the advance of the required amount and without knowledge of the agents or their principals received from the creditors a commission for introducing the business to them, the court held that the sub-agent was liable to the principals for such commission which he received fraudulently from the creditors.⁷

51. Joint-Principals and Joint-Agents.

In some cases there are two or more principals, and questions arise as to their mutual liabilities and rights against one another and the authority of the agent who has several principals.

1. Per Pollock C. B. in *Frith v. Cazenove*, 12 L. T. 177.
2. *George v. Clagett*, 7 T. R. 359; *Peacock & Craham v. Batjnath*, 18 Cal. 582 (585).
3. *George v. Clagett*, supra, as interpreted by Pollock C. B. in *Frith v. Cazenove* sup: see also *Peacock v. Batjnath* supra.
4. See notes on page 305.
5. See notes on pages 311 and 312.
6. S. 192, Indian Contract Act, 1872; See also *Peacock v. Batjnath*, 18 Cal. 573, 613.
7. *Powell & Thomas v. Jones & Co.* (1905) 1 K B. 11; See also *Lockwood v. Abdy*. 14 Sum. 487.

Where there are two or more principals having a distinct interest, the general rule is that no one or more of them can ordinarily appoint an agent for the others without the consent of all,¹ and this statement might be extended by saying that no one of them can without being given authority appoint an agent for any of the others. To make persons joint principals they must agree to appoint either one of themselves or an outsider their agent.² Each may appoint for himself or all unitedly may appoint for all, but one has no implied power to appoint for all. The fact that parties have common or similar interests or that they may be already associated or related makes ordinarily no difference in the application of this rule.

But whatever a man may do of his own right and on his own behalf he may do by agent, and therefore if one or more of several joint principals may of his own right act on behalf of the other principals, he may appoint an agent on their joint behalf.³ Where the interests of all the principals is common, and each is authorised to act for all, either may ordinarily appoint an agent whose acts will be the acts of all, but in those cases where the interest of each is several, and in those cases where the subject matter of agency can only be attained by the united act of all, neither can bind the others by the appointment of an agent.⁴

The case where several persons individually appoint the same person is on a different footing, for in such case in the absence of any thing indicating a contrary intention the authority conferred by each will be deemed to be limited to his own separate and individual business.⁵

The principals may be partners. In this case the principals have entered into a contract between one another to share losses and profits and have made each one the general agent of the other for the purpose of the partnership. The Privy Council, in *The Bank of Australasia v. Breillat*,⁶ adopted Mr. Justice Story's statement of their position, which is as follows:—"Every partner is, in the contemplation of law, the general and accredited agent of the partnership; or, as it is some times expressed, each partner is *praepositus negotiis societatis*, and may consequently bind all the other partners by his acts in all matters which are within the scope of the partnership. Hence if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership, he may draw, make, sign

Partners.

1. Story on Agency, §. 38; Mechem, §. 188.
2. See Wright's Principal & Agent, 2nd Edn., p. 20.
3. See Evans on Principal & Agent, p. 31.
4. See Pearson's Law of Agency, p. 28.
5. See *Harris v. Johnston*, 40 Am. St. Rep. 312.
6. (1847), 6 Moer, P.C. 162, at P. 198.

and endorse, accept, transfer, negotiate, and procure to be discounted promissory notes, bills of exchange, cheques, and other negotiable paper in the name and on account of the partnership.¹

In India, subject to the provisions of the Indian Partnership Act, 1932, a partner is the agent of the firm for the purposes of the business of the firm, and his implied authority as agent of the firm, his authorities in emergency, and his rights and liabilities regarding the business of the firm are governed by Chapter IV of that Act, and may be referred to.² The agent of a partnership is not the agent of the partners or any of the partners individually but of the partnership as a whole.³

Joint tenants
and tenants
in-common.

In the case of joint tenants and tenants-in-common, there is no implied authority in each to act for all so as to bind them personally,⁴ and the act of one or the appointment of an agent by one will, therefore, bind that one only.⁵ All may of course, join in the appointment or subsequently assent to it and thus make the agent the agent of them all.⁶

Clubs and
other asso-
ciations.

Similar questions arise in connection with the voluntary and unincorporated associations, clubs, societies or committees. They are not partnerships in the legal sense of the term.⁷ Hence their members are not liable as partners on the ground of implied authority, but their liability is to be fixed directly upon the rules which govern the relation of the principal and agent. Lord Abinger says:—"I had thought but without much consideration at the assizes, that these sort of institutions were of such a nature as to come under the same view as a partnership, and that the same incidents might be extended to them; that where there were a body of gentlemen forming a club, and meeting together for a common object, what one did in respect of the society bound the others, if he had been requested and had consented to act for them. Trading Associations stand on a very different footing. Where several persons engage in community of profit and loss as partners, one partner has the right, in any ordinary transactions, unless the contrary be clearly shown to bind the partnership by a credit. It appears to me that this case must stand upon the ground which the defendant put it, as a case between principal and agent. I apprehend that one of the members of his club could not bind another by accepting bill of exchange, acting as a committee man, even

1. Story on Partnership, Sect. 124, and see Sect. 125.

2. See notes on pages. 128 to 138.

3. *Johnston v. Brown*, 18 La. Ann. 330; *Deakin v. Underwood*, 37 Minn. 98.

4. *Meehem*, 8. 186; See *Katlar*, p. 91 and the authorities cited therein.

5. *Meehem*, 8. 186 and the authorities cited therein.

6. *Keay v. Fenwick*, 1 C. P. Div. 745; *Lyons v. Pyatt* 51 N. J. Eq. 60. All may acquiesce in the act of one as their agent so as to make it as their own act. *Clute v. Clute*, 197 N. Y. 439; *Ellis v. Smyder*, 88 Kan. 938.

7. See *Katlar*, p. 92; and the American authorities cited therein.

where there might be an apparent necessity to accept, as in the purchase of a pipe of wine, the party might draw a bill but I do not think he could accept the bill to bind the members of the Club. It is therefore a question here how far the committee who are to conduct the affairs of the Club, as agents, are authorized to enter into such contracts as that upon which the plaintiffs now seek to bind the members of the Club at large, and that depends on the constitution of the club, which is to be found in its own rules."¹ In this case, when a club was formed subject to the rules that the entrance fee and subscription should be ten guineas and the annual subscription five guineas; that if the subscription were not paid within a certain definite time, the defaulter should cease to be member of the club; that there should be a committee to manage the affairs of the Club to be chosen at a general meeting; and that all members should discharge their own bills daily, the steward being authorised, in default of payment, on request, to refuse to continue to supply them. The Club was dissolved and the members called upon to pay a sum of eleven guineas each in discharge of its liabilities. The defendants among other refused to pay their share, and the plaintiff sued them for work done and goods supplied for the use of the Club. It was held that the members of the Club, merely as such, were not liable for debts incurred by the the Committee for work done or goods supplied for the use of the Club, for the Committee had no authority to pledge the personal credit of the members.

In such cases therefore no person can be charged upon a contract alleged to have been made upon his responsibility unless it can be shown that to the making of such contract upon his responsibility he has given his express or implied consent. Without such consent there is no authority which will justify one or some of the members of an association to pledge the credit of the others merely because he or they happen to be the members of such association. The assent herein required may, however, be given in a variety of ways and at one time or several times. It may be given in advance by consenting to be bound by all contracts of a certain nature which may be entered into in future, or may be given contemporaneously with the making of a contract, or it may be inferred from subsequent ratification. Where, for instance, it is a part of the scheme or purpose of the organisation as provided by its articles of association, charter, constitution, or by-laws that certain contracts or obligations in behalf, and upon the credit, of the organisation may be entered into either upon the vote of majority or at the discretion of a committee or officer or upon any other lawful contingency or event, any person who becomes a member of the organisation, by so doing, impliedly consents in advance to be bound by any contract or obligation of the kind contemplated, entered into under the circum-

1. *Fleming v. Hector*, 2 M. & W. 172.

stances prescribed.¹ So the members of a co-operative society which carried on a co-operative store were held to be liable for the goods purchased by the manager of such society chosen by them.²

Where, however, there is no such undertaking to abide by the action of the majority,³ or to be bound by the contracts entered by the committee or officers, those only who authorise the making of the contract will be bound.⁴ Hence, where there is a division of opinion and contract is authorized by a majority only, each majority only can be held responsible.⁴ But if the dissenting members subsequently concur or acquiesce in the making of the contract, they will be bound in the same manner as if their assent had been previously obtained.⁵ *Todd v. Emly*⁶ was an action against the defendants, two members of the Committee of the Alliance Club, tried at the Assizes to recover the price of wine furnished to them. It was proved that the wine was ordered by the house steward, who stated that he had authority to do so from the members of the committee. It was not shown that the defendants had either personally interfered in ordering the wine, or been present at any meeting of the committee when the authority to order the wine was given; but merely that they were members of the general body of the committee. The case was not left to the jury, counsel for the defendant submitting to a verdict for the defendants upon leave being reserved to move for a new trial; at the hearing of the rule Lord Abinger said: "It does not appear upon the evidence that they (the Committee) were authorized by any member of the Club to deal on credit, but only to expend the funds which they had in their possession as trustees If it were provided by the rules and orders of the Club, that the Committee conducting the affairs of the club, should have authority to make contracts for the Club, then they might make contracts for each other; but in the absence of any evidence of that kind, what is it more than the case of gentlemen being named as trustees to manage a fund. The fund is placed in the banker's hands, and there it is to remain to answer the demands of the club; but it does not appear that the committee authorized each other to pledge each other's credit, or that the Club, as a body, authorized the committee to pledge their credit. That is the principal laid down in *Fleming v. Hector* and appears to me to be applicable to the case, unless it can be shown, that by the rules and orders of the Club the Committee were authorized

1. See *Mechern*, 8. 188.

2. *Davison v. Holden*, 3 Am. St. Rep. 40.

3. Even a majority cannot extend or alter the purpose for which the association is constituted or for which a particular fund of it is earmarked by its constitution. See *Katlar*, p. 93 and the American authorities cited therein.

4. *Toddy v. Emly*, 7 M. & W. 427; *Overton v. Hewett*, 3 T. L. R. 246; *Steele v. Gourley*, 3 T. L. R. 772; *Wood v. Finch*, 2 F. & F. 447; *Draper v. Manvers*, 9 T. L. R. 78.

5. See *Heath v. Goshin*, 80 Mo. 810; *Elphbaum v. Irons*, 40 Am. Dec. 540.

6. 7 M. & W. 427.

to contract upon credit, or that in any other way the whole Club agreed that the Committee should make such contracts." The Court held that the plaintiff was not entitled to recover without proving either that the defendants were privy to the contract or that the dealing on credit was in furtherance of the common object and purposes of the Club, and a rule absolute was made for a new trial.¹ The Court held that the question was not whether the defendants by their course of dealing, had held themselves out as personally liable to the plaintiffs, but whether they had individually authorized the making of the contract in the ordering of the wine.

*Wood v. Finch*² was a case where a Coal Club was formed by subscription, the coals being supplied to the members according to their respective subscriptions, the subscription, as paid, being paid to a Secretary who paid the money into the bank in the name of trustees. The Secretary ordered such coal as he thought to be necessary for the purposes of the Club, but it in no way appeared that he was authorized to pledge the credit of the Society. The plaintiff a coal dealer who had supplied coals on credit sued one of the trustees for money due to him. Between the defendant and the plaintiff there had been before suit no communication whatever. It was held that he was not liable for the coals ordered on credit by the Secretary, there being no proof of any authority to pledge his credit.

In *Steele v. Gourleys*³ the action was brought by a butcher who had supplied meat to the Empire Club. The defendants were the members of the Committee of the Club, who had taken an active part in the management, by attending the meetings of the Committee, and taking part in authorizing the payments of the traders' weekly bills. By the rules of the Club the property of the Club was vested in trustees. The plaintiff had for some time been paid monthly the amounts of his weekly accounts for the meat which he supplied but ultimately the funds of the Club became deficient, and the bills were not paid. There was evidence that a book of the rules of the Club had been shown to the plaintiff, but he said he had not read them, though he had looked at the list of the names of the Committee. The Court held that there was evidence from which the jury might reasonably come to the conclusion that the defendants had authorized or acquiesced in the giving of the orders by the steward of the Club to the plaintiff on the ordinary terms as to payment. That being so, the defendants were liable though the mere fact that they were members of the Club and members of the Committee would not have been enough to make them liable; that the plaintiff had given credit to the Club, and not to the defendants, but as it was settled by *Delauney v. Strickland*, 2 Stark 416, *Toddy v. Emly* 8 M. & W. 505, that when a tradesman supplied goods believing that the person who ordered them was authorized by A to do so, and it afterwards turned out that

1. 8 M. & W. 505.

2. 2 F. & F. 447.

3. W. N. (Eng.) (1887), 147.

A had not given authority but B had, the tradesman was entitled to sue B as an undisclosed principal, those cases could not be overruled.

It is also clear that the liability of a member of an association to other members and third person, may, either expressly or by implication to the funds contributed or agreed to be contributed for its purpose unless there is something to indicate that he has assented to a wider liability. In the case of an ordinary club, for instance, which has a fixed initiation or admission fee and regular periodical contribution, it must be assumed that the liability of each partner is limited to such contribution only, and mere membership or acquiescence in the ordinary affairs of the club cannot be deemed evidence of a consent to be bound beyond this limit. This liability relates only to the acts done during the continuance of his membership and ceases with its termination and the payment of the dues for that period. In order to charge him with a personal liability beyond this something evidencing an assent to be bound in that manner would be required. This rule also holds good in the case of other associations not worked for gain. Materials are often supplied and services rendered to such associations only upon the basis of the credit of the subscribed funds and individuals cannot be held liable unless there is some evidence besides that of mere membership reasonably warranting the inference that a personal liability was in contemplation.² So, membership in an association, society, club, or committee does not make the member personally liable upon contracts purporting to be made on its behalf, unless there is something in the charter, by-laws, or articles of association authorizing the pledging of the credit of the association, to which he is presumed to have assented by becoming a member and then only in those cases where the contract is within the limits prescribed therein. In other cases a member can be personally liable only if he either expressly or impliedly gave his assent to the contract. Such assent, however, may be shown either by his previous consent or by his subsequent adoption or by his acquiescence in an established course of dealings.³ But a corporation is not responsible for the acts and contracts entered into by its promoters or other persons assuming to bind it in advance before its organisation, inasmuch as it had no legal existence then, and, therefore, was incapable of doing any act or entering into any contract, or appointing any officer or agent.² When it is organised, however, it may expressly or impliedly, become a party to a previous contract by novation or it may make a present contract by accepting an outstanding offer made previous to its organisation, or it may adopt and assume the responsibility of such acts or contracts, if within its corporate powers, and thus make them valid and binding obligations. Such assumption may be, as

1. *Wise v. Perpetual Trustee Co.*, 1903, A.C. 139; *Fleming v. Hector*. 2 M. & W. 172

2. *Mechem*, §. 189.

3. *Mechem*, §. 188.

4. *Mechem*, §. 193, *Katlar*, P. 95 and the authorities cited therein.

in other cases of adoption, implied where the corporation with full knowledge of the facts, appropriates to itself the benefits and advantages arising out of such acts or contracts, for it cannot take the benefit of the contract without performing that part of it which the promoters undertook that it should perform.¹

As either land or chattels may be owned in common, it is necessary to consider for the purpose of agency the position of joint owners *inter se*, for each co-owner can only delegate to an agent such rights as he himself may have.

owners.

Co-owners are not always agents of one another, although the border line between co-owners and partners is narrow. Examples of this difference are given by Mr. Lindley in his work on Partnership;² he says, "If several persons jointly purchase goods for resale with a view to divide the profits arising from the transaction a partnership is thereby created; but persons who join in the purchase of goods not for the purpose of selling them again and dividing the profit, but for the purpose of dividing the goods themselves, are not partners, and are not liable to third parties as if they were."

Two persons who are not partners but who concur in giving an order for an undivided parcel of goods, are not jointly liable to the seller, if upon the whole transaction the intention of the parties appears to have been that the buyers should be severally responsible for the amount of their respective interests in the goods. Thus is *Gibson v. Lupton*³ the defendant Lupton, being an oil merchant, and the defendant Wood a corn miller, gave the following order to the plaintiff's agent "Ordered of the house of John Fisher and Co., a small loading of wheat, say 750 or 800 quarters. Payment for the same to be drawn upon each of us in the usual manner." The plaintiffs in pursuance of this order purchased wheat and wrote to Wood and Lupton as follows:—"We have made a purchase for your joint account of 736 quarters fine red wheat." The plaintiffs drew bills on Lipton and Wood. The wheat turned out of bad quality and in consequence the bills were dishonoured but were renewed, the renewed bill on Lupton was duly paid, but Wood's was dishonoured and he became a bankrupt. The Plaintiffs sued both defendants to recover that part of the price of the wheat which remained unpaid in consequence of Wood's failure to pay. Tindal C.J., "There is no question in the case as to any partnership, *inter se* between the defendants, ... but the question is whether the wheat was sold to the defendants upon a joint contract; that is, whether upon the correspondence and other facts set out in the case, the defendants gave the plaintiffs reason to understand and believe that they had the joint security of both defendants for the whole cargo, or whether the fair inference to be drawn by any reasonable men—and if so, the plaintiffs must be taken to have drawn such inference themselves—was not that each of the defendants contracted separately for his moiety of the joint cargo. And upon looking

1. Mechem, § 193; Katlar, p. 95.

2. Lindley, p. 58

3. 9 Bing. 297.

at the whole correspondence, and other circumstances of the case, the latter appears to us to be the proper conclusion." Thus again, where the defendants, Eyre and partners, Hatherby for himself and Stephens, and Pugh for himself and son agreed to purchase jointly as much oil as they could procure on the prospect that the price of oil would rise, Eyre and Co., being the ostensible purchasers through a broker, but the others were to share in his purchase at the price at which he bought, Hatherby and Co., and Pugh and Co., taking one half, and the defendants, Eyre and Co., the other moiety. Large quantities of oil were bought, Hatherby and Co., occasionally coming forward and giving directions as to its delivery, and making declarations that they were all jointly interested in the purchases. The price of oil fell, and Eyre and Co., having failed, the defendants contended that they were not liable, the contract having been made with Eyre and Co., only, and that the agreement which the defendants entered into between themselves was only a sub-contract and did not constitute a partnership. The Court held that the defendants were not jointly liable.¹ Such persons are not therefore joint principals.

An assignment of their shares of a chattel by some part owners, and purporting at the same time to assign the whole for the same reason does not bind a part-owner, who is not a party to the assignment.²

As no joint owner can bind another, if any one is desirous of binding the whole or securing a right against all, they must all join when they become joint principals. So where two of three joint mortgagees consented to an arrangement by which they accepted a composition, and agreed not to foreclose, and the third refused to do so and brought a foreclosure action, the Court held that as the mortgagees were not beneficially interested in the money, that the beneficiaries were only bound by the act of all, and the composition deed was held not binding on them and decreed foreclosure.³ Similarly payment to one of two joint owner trustees was held not to bind the other.⁴

It has also been held under the English Law that if a right of action is released by one of two joint owners or creditors who is a trustee,⁵ or has no beneficial interest, the Court would set aside the release.⁶ Where two or more persons pay money into a bank in their joint names, it cannot be withdrawn except on the signature of all.⁷

Joint-
creditors.

So it has been held that in respect of a bond given by C to A and B where accord and satisfaction by delivering of stock goods by C to A was pleaded, that accord and satisfaction must be taken to be an answer to an action for a specialty debt; but

1. *Coops v. Eyre*, 1 H. Bl., 37.

2. *Harper v. Godsell*, (1870), L. R. 5 Q. B. 422.

3. *Luke v. South Kensington Hotel Co.*, (1879) 11 C. D. 121.

4. *Lee v. Sankey*, (1873), L. R. 15 Eq. 204.

5. *Manning v. Cox* (1823) 7 Moore, 617.

6. *Innell v. Newman* (1821) 4 B. & Al. 419; see also *Rawstorne v. Gandell* (1846) 15 M. & W. 304.

7. *Innes v. Stephenson* (1831) 1 Moo. & R. 145.

that according to equity joint creditors, *prima facie*, be taken to be interested as tenants is common and not as joint-tenants, and that the defence was good only as concerned the claim of the plaintiff who was party to the accord and satisfaction, and that the defence was therefore defective and no answer to the action.¹

Membership of the committee of a club does not make one liable as such for the acts of the other members of the committee where one is not present. Thus, where the defendant was a member of the managing committee, and the goods supplied by the plaintiff were ordered by a sub-committee, he was held not liable, although he was present when the sub-committee was appointed.² There must be some evidence that the member sued was responsible for the act personally or acquiesced in it.³

Managing
Committee.

If the names are circulated in a prospectus with other matter, the liability depends on the question what inference ought a reasonable man to draw from the contents of that paper. And if a person allows himself to be appointed a member of a committee, hears their arrangements, attends meetings, and allows his name to be used, he renders himself liable for all that the Secretary or the committee do in pursuance of the purposes of the committee; and to any one who contracts with the secretary or committee on the faith of his name among others, and looking to the committee for payment and not possible funds.⁴ In *Real and Personal Adrance Co., v. Phalempin*,⁵ it was held that the presumption is that a person contracting with such a committee has contracted on the terms that the members of it are to be personally liable unless there is something in the agreement to rebut this presumption.

Members of
Committee.

The mere fact of a person allowing his name to be put down as a member of a provisional committee is not sufficient to make him liable for its acts. Such a permission amounts to no more than a representation that the person giving it will act with the other persons appointed, or to be appointed, for the purpose of carrying out the particular scheme, and does not *per se* involve any liability.⁶

Provisional
committee.

Story lays it down as a general rule of the common law that where an authority is given to two or more persons to do an act, the act is valid to bind the principal only when all of them concur in doing it, for the authority is construed strictly,

Joint-agents.

1. *Steads v. Steads*, L. R. 22 Q. B. D. 587.

2. *Draper v. Earl Mancro* (1892), 9 Times, 73. See also (1886) *Overton v. Hewitt*.

3. *Todd v. Emly* (1841), 8 M. & W. 505; *Punk v. Soudamore* (1891), 5 Car. & P. 71; *Luckombe v. Ashton* (1862), 2 F. & F. 705; *Stangfield v. Rideout*, (1889), 5 Times, 655. As to the different ways members may be liable, see questions in *Harper v. Granoille Smith* (1891), 7 Times, 284.

4. *Bailey v. Macaulay* (1849), 13 Q. B. 815. See p. 826; *Steele v. Gourley* (1887), 3 Times 772.

5. (1893), 9 Times, 569.

6. *Reynell v. Lewis* (1846), 15 M. & W. 517.

and the power is understood to be joint and not several.¹ Coke,² says, if A makes letter of attorney to B, C and D, *conjunction et division* (jointly and severally), to make livery, if only two make livery it is void, because it is neither *conjunction* nor *division*; but if one makes livery in one parcel and another in another parcel it is good. But if two make livery in the presence of the third, on the principle that when a person is present and he allows a thing to be done by a third party, the person doing it is regarded as acting only as the instrument or tool of the other.

In more modern times, however, this strictness has been relaxed, and the Courts now will search the power to find the maker's intention. Thus in *Guthrie v. Armstrong*³ a power of attorney was given to 15 persons jointly or severally to execute such policies as they or any of them should jointly or severally think proper, Abbott C. J. holding that the execution by four was sufficient, said:—"Here a power is given to fifteen persons jointly or severally to execute such policies as they or any of them shall jointly or severally think proper. The true construction of this is, as it seems to me, that the power is given to all or any of them to sign such policies as all or any of them should think proper. The argument is that the latter words only apply to the persons who are to exercise the discretion. That would have been quite correct, if those had been different from the persons entrusted with the power."

Authority of
joint-agents
does not
survive.

When any of the joint agents die the authority does not survive to the survivors, for Coke says,⁴ where a naked power (one not clothed with any beneficial interest) is vested in two or more *nomination* without any reference to an office in its nature liable to survivorship, as an executorship is, it, without doubt, would be a contradiction of the general rule to allow the power to survive. Therefore, when authority has been given to two or more persons jointly to act as agents, their acts are only binding on the principal, when all concur. And when a power was given jointly and severally, the older cases showed that it has to be executed by one or by all, unless the donor of the power clearly showed he intended the execution to be good if it were executed by some one of them; as, for instance, by using the words "or any of them", after giving the joint and several power.

When the
authority is
given for
public pur-
poses it
survives.

Coke⁵ points out there is a difference as to survivorship, between "authorities created by the party for private causes and authorities created by the law for the execution of justice", and gives as an example a direction by the sheriff to four persons jointly to arrest a person which could be executed by two, because it is for the public benefit and should therefore be more "favourably expounded than when it is only for private"; and this distinction has been applied to public bodies and public

1. Sec. 42.

2. Coke upon Littleton, 52 (b), n. 2. See also *Boyd v. Durand* (1809), 2 Tauton, 161; *Brown v. Andreu* (1849), 18 L. J. Q. B. 153; *Cook v. Ward*, (1877) 2 C. P. D. 255.

3. 5 B. & Ald., 628. *Godfrey v. Saunders*, 3 Wils., 73, 74, 94.

4. 118 a, n. 2.

5. Coke upon Littleton, 151b.

powers generally and, therefore, a distress warrant which was a joint warrant and not a joint and several one, was held to be well executed by one of the persons it was addressed to.¹ In the case of public authorities, therefore, the common law rule has been held to be not so strict in several cases, and such an authority can be exercised by a majority. Thus, where under statute which enabled the churchwardens and overseers with the consent of the major parts of the parishioners to contract for the providing of the poor, it was held to be unnecessary that all the churchwardens and overseers should concur, the contract of the majority of them being sufficient.² And in *Grindley v. Barker*³ Eyre C. J. said:—"I think it is now pretty well settled, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole. The cases of corporations go further; there it is not necessary that the whole number should meet; it is enough if notice be given, and a majority, or a lesser number, according as the charter be, may meet, and when they have met, they become just as competent to decide as if the whole had met." In *Attorney General v. Dary*⁴ the question arose whether the majority of a body incorporated by charter could elect a Chaplain, and it was held they could; and, similarly, in *Withnell v. Gartham*⁵ where the same question arose as to the appointment of a schoolmaster, it was held that the majority could appoint.

It may be therefore taken that where in private agencies a power is given to joint agents to act, the presumption is that it is conferred upon all from considerations of a personal nature, and with the object of making use of their combined experience and discretion; and that therefore such power can only be carried out by such agents jointly, unless indeed it appears from a proper construction of the power, that it is, or might be well intended that it should be exercised otherwise. On the other hand, in the case of public agencies, or rather, agencies of a public nature, the rule appears to be that all the joint agents must meet to consult, but that the majority will conclude the minority, and their act will be the act of them all; and that in the case of corporations it is not even necessary that the whole number should meet, it being enough if notice be given, and a majority or lesser number be present, and when they have met, those present may act for the whole numbers.⁶ This, of course, will be subject to the provision relating to quorum pertaining to the particular corporation.

Directors of companies are the agents of the companies they belong to, and are subject to the same rule that to exercise the authority conferred validly it must be exercised by all unless

Directors of
companies.

1. *Lee v. Vesey* (1856), 1 H. & N. 90.
 2. *The King v. Beeston*, 3 T.R. 592.
 3. 1 B. & P. 234.
 4. (1741), 2 Atk. 212.
 5. (1795), 6 Term Rep 388.
 6. See *Pearson's Law of Agency*, p. 39.

there is something in constitution of their authority which allows them to act by quorum. Lord Lindley, when Master of the Rolls, said: "Speaking generally, it is clear that if a person appoints six others to be his agents jointly, he is not bound by the acts of any five, four, three, two, or one of them. Therefore, if the affairs of the company are entrusted to the management of not less than a fixed number of directors it is *prima facie* not bound by the acts of a fewer number.² For this reason public companies generally provide by their articles of association what number of directors shall be a quorum to exercise the powers. Unless, however, there is some provision for a quorum, or any other specific provision in the articles of association, acting directors can only exercise their powers when acting all together. It has however been held under the English Law that acts ostensibly of directors, are binding on the company if third parties dealing with the directors have notice of the irregularity.⁴

Prima facie
authority is
only valid
if executed
by all the
joint-agents.

Where the principal confers authority upon two or more persons jointly the ordinary effect of such joint appointment is to put them in the same position in which a single agent would have been. As observed by Nelson C.J. in the *Bank of the United States v. Davis*¹: "If a principal employs several agents to transact jointly a particular piece of business, he is equally responsible for the conduct of each and all of them while acting within the limits and scope of their power, as completely as he would be for the conduct of a single agent upon whom the whole authority had been conferred. He cannot shift or avoid this responsibility by the multiplication of his agents. It is also clear that the corresponding responsibility of each of the several joint agents to the principal for the faithful discharge of their duties, is as complete and perfect as in the case of a single agency, and any prejudice to the principal arising from fraud, misconduct or negligence of either of them would afford ground for redress from the party guilty of the wrong. It is familiar law that where two or more persons undertake to execute a private agency together they are jointly liable each for the acts of the other; nor is it any defence that one of them wholly transacted the business with the knowledge of the principal. Each is liable for the whole, if they jointly undertake the agency, notwithstanding an agreement between themselves to the contrary, or that one shall have the profits."

The above proposition, however, is not true in the case of mere fellow agents who had not jointly undertaken to perform the service.⁶ The law on the subject in England is thus stated by Bowstead:

"Where an authority is given to two or more persons, it is presumed to be given to them jointly, unless a contrary intention

2. Lindley on Companies, 5th Ed., p. 155, 156.

3. Lindley on Companies, 5th Ed., p. 299; *Re Portuguese Copper Mines, Ltd.* (1889), 42 O. D. 160; *D Arcy v. The Tamer & R Co.*, (1867), L. R. 2 Ex. 158.

4. *Totterdell v. Farsham & Co., Ltd.* (1886), L. R. 1 C. p. 674.

5. 2 Hill, (N.Y.) 451.

6. *Sergeant v. Emlen* 141 Pa. 580.

appears from the nature or terms of the authority, or from the circumstances of the particular case.¹

All the co-agents must concur in the execution of a joint authority in order to bind the principal, in the absence of a provision that a certain number of them shall form a quorum; provided that, where the authority is of a public nature, and the persons in whom it is invested all meet for the purpose of executing it, the act of the majority is, for this purpose, deemed to be the act of the whole body.

Where an authority is given to two or more persons severally, or jointly and severally, any one or more of them may execute it without the concurrence of the other or others".

Thus, where a provisional committee appointed eight specified persons to act as a managing committee on their behalf, and six of such persons gave an order, within the scope of the authority conferred, it was held that the provisional committee were not bound by the order.²

Two persons filled the office of clerk to the trustees of a road. Held, that they must contract jointly in order to bind the trustees.³

The regulations of a company provide that business shall be managed by directors, a certain number of whom shall constitute a board. The company is not bound by the acts of the directors, unless consented to by them all, or by a majority present at a duly convened and constituted board meeting.⁴

The directors of a company, being duly authorised in that behalf, resolved that all their powers, except their power to make calls should be delegated to three of their number as a committee. Held, that at a meeting of the committee for the purpose of exercising such powers, all the members of the committee must be present.⁵

A principal has power to give authority to several agents to act for him either jointly or jointly and severally, but a mere authority to act conferred on several persons jointly without further specification as to whether it is joint or joint and several is presumed to be joint authority⁶ and can be acted upon only jointly.⁷

1. Article 7, p 10.

2. *Brown v. Andrew* (1849), 18 L. J. Q. B. 153.

3. *Bell v. Nixon*, (1832), 9 Bing 393.

4. *Eidley v. Plymouth Grinding Co.*, (1848), 2 Ex. 711, *Kirk v. Bell* (1850), 16 Q. B. 290, *D'Arcy v. Tamar Ry* (1868), L. R. 2 Ex. 158; *Ex P. Smith* (1888), 39 Ch. D. 540; *Re Haycraft, etc. Co.*, (1900), 2 Ch 280.

5. *Re Liverpool Household Stores* (1890), 59 L. J. Ch. 616.

6. *Halsbury Brown v. Andrew*, 18 L. J. Q. B. 153.

7. *Boyd v. Durand*, 2 Taunt 161; *Bell v. Neron*, 9 Bing, 393.

CHAPTER IX

DUTIES OF AGENTS.

52. Rights and duties relative terms 53. Duties of the agent to his principal 54. Agent's duty in conducting principal's business 55. Skill and diligence required from agent 56. Measure of damages 57. Duty of agent to communicate with the principal 58. Agent's duty to perform his undertaking 59. Agent's duty not to deal in the business of the agency on his own account 60. Agent must not use material on information acquired, in course of agency 61. Agent's duty to pay to the principal all the sums received on the principal's account 62. Deductions which the agent is allowed to make 63. Liability to pay interest when arises 64. Agent's duty to keep the principal's property separate and to preserve correct accounts 65. Agent's duty to render proper account to the principal 66. Agent's duty not to deny the principal's title to the property entrusted to him as agent 67. Duties of particular classes of agents.

52. Rights and duties—relative terms

As has already been referred to (see page 1), every right whether primary or secondary and whether *in rem* or *in personam* involves a corresponding duty which the person or persons of incidence, as the case may be, owe to the person of inherence. Infringement of any right is neither more nor less than a mere breach of such duty which results in impairing, destroying or interfering with the enjoyment of such right and creates a liability against the person of incidence who commits such act or omission in favour of the person in whom the right inheres. This liability constitutes the remedy which the person of inherence has against the person of incidence for the infringement of the right. The mere fact that the enjoyment of a certain right of one person is interfered with by the act or omission of some other person does not give rise to any liability against the latter unless he owes a duty to the former not to do the act or not to commit such omission. In the absence of such duty every man is free to do or omit to do what he likes and the law will always respect this freedom of action. So whatever a man does or omits to do in exercise of this right of freedom of action which is his birthright is not actionable even though it may interfere with the enjoyment of some right of another unless the former owes a duty to the latter and such act or omission is committed in breach thereof. For instance, to walk over a public road is the right of every man and when there are large crowds walking over it there is always some interference and annoyance to all of those who pass on it, but this interference itself cannot be said to be actionable as it is due to the acts which are done in the exercise of a right and not in breach of any duty. But it is every man's duty to respect the person or life of another and not to walk over or drive rashly so as to cause hurt to others in breach of this duty and any one who walks over or drives rashly breaks this duty and thereby makes himself liable to the others who happen to be there in exercise of the public right. Acts done in breach of duty always give rise to a liability, while acts done in exercise of a right without such breach are always a good defe-

one against an action. So right and duty are only relative terms. Law has been defined as rules which regulate the conduct of a man and man; it is always more proper and logical to discuss their duties to each other than to discuss their respective rights. The purpose is more perfectly served by a definement of their duties, i. e., by laying down what acts they should do and what they should omit to do in deference to their fellow-beings, than by a definement of their rights, i. e., what they can do with impunity or what claim they can lay against their fellow-men.¹ Hence in the modern jurisprudence of the West there is a tendency to legislate in the terms of duties rather than in terms of rights. The Hindu jurists also almost always legislated in terms of duties. The Indian Legislature, in the Indian Contract Act, too seems to have adopted this mode of legislation by definement of duties rather than by definement of rights of the principal and agent.² It is therefore proposed to discuss the relations of the persons concerned in terms of their duties to each other rather than in terms of their respective rights. The duties and liabilities of one party are generally the rights of the other and their reciprocal rights are the same as their reciprocal duties.³

There are usually three parties involved in a transaction of agency, namely, the person who represents another, the person who is represented and the person to whom such representation is made, who are respectively called the principal, the agent, and the third person. In every transaction therefore each of these three persons owes separate and distinct duties to the two others. The principal owes duties to the agent as well as to third person. So the agent owes duties to the principal as well as to the third person with whom he deals as such, and also third persons owe certain duties to the principal as well as to the agent. This Chapter deals with the duties of an agent.

The principal, the agent and the third person.

53. Duties of the agent to his principal.

The duties of an agent to his principal are two-fold, contractual and fiduciary, i. e., those arising from the terms of the contract of agency and those arising from the position of trust which he occupies. The rights and duties arising out of the relation of principal and agent are, as has been already observed, to be ascertained in the first instance, by reference to the contract express or implied. The mere existence of the relation raises the implication of a contract involving certain rights and duties, the nature and extent of which depend upon the circumstances of the particular case, and the parties, in entering upon the relation, may leave the incidents arising out of it to be determined wholly by reference to the rights and duties so implied. Where, however, the parties have defined their position by an express contract, the incidents of their relation depend upon their contract as legally construed, subject nevertheless to such of the rights and duties implied by law or by some custom or usage of trade or locality as are not clearly

1. See Holland on Jurisprudence, p. 7.

2. See Katiar, pp. 431, 432.

3. See Mechem, § 1186.

excluded by express words or by necessary implication. A term will not be implied merely because it is reasonable; it must be necessarily implied in the nature of the contract.¹ The contractual duties of an agent vary with the terms of the contract, and it is always open to the parties to the contract to stipulate according to their own requirements and convenience. Thus, for instance, the agent's duty to continue in the service for the stipulated period or until the completion of the stipulated business, to obey the directions given by the principal in the contract of agency from time to time as the occasion arises, not to exceed the authority conferred upon him, not to be negligent in the conduct of the business of the agency, to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, may be mentioned as the duties of an agent. All these duties may be specially stipulated for or may arise by implication from the contract and may be modified, excluded, limited or extended by the parties to the contract by a special stipulation to that effect. Fiduciary duties or duties which arise from the agent's special position of trust are duties which the law imposes on the agent to prevent him from a misuse of his position and from taking undue advantage of the confidence reposed in him. The agent's duty to render proper accounts to his principal on demand, not to deal on his own account in the business of the agency without the principal's consent and not to make secret profits fall in this latter class.

Effect of
usage or
custom.

Wherever a principal employs an agent belonging to a class, of professional agents, or instructs him to deal at a particular place, a question arises how far the usages of the class or place in question are incorporated with the contract between them. Where the contract is an implied only, such usages are deemed to be incorporated, provided that they are reasonable, even though the principal be in fact unacquainted with them. But no usage, which the Courts hold to be unreasonable, is binding upon the principal, unless he is shown to have known of it at the time when he employed the agent, and to have assented to it, or unless the circumstances of the particular case preclude him from denying his knowledge and assent. The same rules apply to the case of an express contract, except that no usage can be incorporated which is inconsistent with the expressed intention of the parties.²

Nature and
extent of
the fiduciary
duties.

The relation is of fiduciary nature, whenever the principal reposes trust and confidence in the person whom he selects as his agent. This is so in all cases of general agency, but where the agency is not a general one, its fiduciary nature depends upon the circumstances of the particular case.³ The fiduciary capacity of an agent is the distinguishing feature between him and an ordinary servant and renders him liable for any things for which an ordinary servant is not liable.

1. See Halsbury, Vol. I, 2nd Edn : Art. 409, pp. 239, 240.

2. Halsbury, Vol. I (2nd Edn.) Art. 410, and the authorities cited there in. See also notes on pages 140 to 162.

3. Halsbury, *ibid*, Art. 411, p. 241.

Duty to keep the property of the principal separate from his own and to render proper account when called for is a duty which the agent owes to his principal specially on account of this fiduciary capacity.¹ The duties of an agent arising from his fiduciary capacity vary with the confidence which the principal chooses to repose in him and with the power which the agent wields over the subject-matter by virtue of the terms of the contract of agency if any or by virtue of the incidents of law and usage of the business which the relation implies.²

CONTRACTUAL DUTIES.

54. Agent's duty in conducting principal's business.

An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

To follow the directions of the principal and in their absence the custom of the business.

ILLUSTRATIONS.

- (a) A, an agent engaged in carrying on for B a business in which it is the custom to invest from time to time, at interest the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.
- (b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

(S. 211, *Indian Contract Act*, 1872).

The English law on the subject is thus stated by Bowstead:—

"It is the duty of every agent strictly to pursue the terms of his authority and obey the lawful instructions of his principal; and, in the absence of express instructions, to act according to any lawful and reasonable usage applicable to the matter in hand, or where there is no special usage, and in all matters left to his discretion, to act in good faith, to the best of his judgment and solely for the benefit of the principal".³

As has been already observed, the authority of an agent may consist of the express directions or may be implied from the circumstances of a particular case. The difficult cases which give rise to an agent's authority by implication have already been dealt with in Chapter V. If the act of the agent in respect of which the question arises, is covered by his authority either express or implied, it will be deemed to be quite in compliance with the directions of the principal. If, however, all the elements of authority enumerated and discussed in Chapter V do not

1. *Knight v. Savage Mfg. Co.*, 71 Am. Dec. 600.

2. See Katiar, p. 511.

3. *Law of Agency*, 9th Edn., Art. 45, p. 90.

justify the act, it is in excess of his authority and the agent renders himself liable for a breach of duty by committing such act.

Further
illustrations.

Thus, where an agent is instructed to sell certain shares when the funds reach eighty-five or more, he is bound to sell when the funds reach eighty-five, and has no discretion to wait until they go higher.¹

A by letter requests B to purchase 150 bales of cotton and forward a bill of lading, in exchange for which A undertakes to accept B's draft. B accepts the commission. B is bound to forward the bill of lading as soon as possible, and is not entitled to retain it until A gives security for payment. If he does so retain it, A is justified in refusing to accept the cotton.²

An agent, instructed to warehouse goods at a particular place, warehouses a portion of them at another place, where they are destroyed, without negligence. He is liable to the principal for the value of the goods destroyed.³

A foreign merchant sends a bill of lading to his correspondent in England with instructions to insure the goods. If the correspondent accepts the bill of lading he is bound to insure.⁴

A solicitor, retained to conduct an action, is expressly instructed by the client not to enter into any compromise. It is his duty to obey his client's instructions, even if counsel advise a compromise.⁵

An auctioneer, at a sale without reserve, is instructed by the vendor not to sell for less than a certain sum. Such instructions are unlawful, and it is the duty of the auctioneer to accept the highest *bona fide* bid, even if it be for less than the sum mentioned.⁶

An auctioneer, contrary to the usual custom, takes a bill of exchange in payment of the price of goods sold. He is liable to the principal for the amount of the bill in the event of its being dishonoured, it being the duty of an auctioneer, in the absence of special instructions, to sell for ready money only,⁷ but he may take a cheque in lieu of cash in payment of the deposit, according to the usual custom.⁸ An agent ought not, however, to accept a cheque in lieu of cash which he has been authorised to receive, unless it is customary to do so in the particular business in which he is employed.⁹

1. *Bertram v. Godfray* (1830), 1 Knapp 381, P. C.

2. *Harber v. Taylor* (1839), 5 M. & W. 527.

3. *Lilley v. Doubleday* (1881) 7 Q. B. D. 510.

4. *Smith v. Lascelles* (1788), 2 T. R. 187; *Corlett v. Gordon* (1813), 3 Camp. 472.

5. *Fray v. Foulcs* (1859), 28 L. J. Q. B. 232. And see *Swinfen v. Swinfen* (1858), 2 De G. & J. 38; and *Neale v. Gordon Lennox*, (1902), A. C. 465, H. L., as to the

duty of counsel to act according to his client's wishes.

6. *Beauchell v. Christie* (1778), Cowp. 395.

7. *Ferrers v. Robins* (1835) 2 C.M. & R. 152.

8. *Farrer v. Lacy* (1885), 31 Ch. D. 42.

9. *Pope v. Westcott* (1894) 1 Q. B. 272.

A stockbroker is instructed to sell certain shares. It is his duty to sell for ready money, according to usage, in the absence of special directions to the contrary.¹

A stockbroker sells shares, on behalf of a client. The shares are in the possession of the client's banker. The broker is under no obligation to pay to the banker the price at which the shares were sold against delivery of the shares, or to ask the jobber who bought them to pay the banker direct for them. He is only bound to carry the contract through according to the rules of Stock Exchange, and the ordinary course of business.²

Where there is a custom, when goods are entrusted to a broker for sale, to send an estimate of the value to the principal in order that he may fix a reserve price, it is the broker's duty to send such an estimate to the principal, and if he does not do so he must make good the loss.³ The plea that the act was done in good faith for the benefit of the principal without negligence is not a good defence in such cases.⁴

Where a solicitor enters into a compromise on behalf of his client, notwithstanding express instructions of his client to the contrary, he is liable to the client for damages even though the compromise was reasonable and was entered into in good faith for the benefit of the client and on the advice of the counsel engaged in the case.⁵

Where a purchasing agent receives an order to make certain purchases for the principal, but before such order is executed or any step involving any liability is taken, the order is countermanded by the principal, any purchase made by the agent subsequent to such countermand is without authority and is not binding on the principal.⁶

It is the duty of a house or estate agent where he is instructed to find a purchaser for property, to submit any offers which may be made to him to his principal, and not to enter into a contract for the sale of the property unless the principal has expressly authorised him to do so.⁷ The duty to submit offers made continues until a binding contract of sale and purchase has been concluded.⁸

A company's estate department acted for the vendor of a house. In ignorance of that fact the company's building department acted for the purchaser and gave a report on the house which had the effect of reducing the price obtainable from

1. *Wiltshire v. Sims*, (1808) Camp. 258.

2. *Hawkins v. Pearce* (1903) 8 Com. Cas. 87.

3. *Solomon v. Barker*, 2 F. & F. 726.

4. *Beckthard v. Bank*, 47 Mo. 181; *Dickson v. Scriven*, 23 S. C. 212.

5. *Butler v. Knight*, L. R. 2 Ex. 109; *Fray v. Voules* 1 E. & E. 839.

6. *Dewan Chand Kirpa Ram & Co., v. Weld & Co.*, 1925 P. O. 150; *Lakshmi Chand v. Chotoram*, 24 Bom. 403. See also *Mathuradas Mutsaddilal v. Kishenchand Ramjidas*, 1925 Lah. 332.

7. *Chadburn v. Moors*, (1892), 61 L. J. Ch. 674, Comp. *Rosenbaum v. Balson* (1900) 2 Ch. 367; *Kean v. Mear*, (1920) 2 Ch. 574.

8. *Keppel v. Wheeler* (1927) 1 K. B. 577.

the purchaser. It was held that the action of the building department was a breach of the company's duty to the vendor.¹

In the absence of custom of trade or express or implied authority of the principal, payment to broker is no payment to the principal.²

A commission agent with instructions to sell and purchase for the principal has no authority to transact the business with himself under a particular name³ and no agent without the consent of his principal, or without a term in his authority can treat himself as principal.⁴

Where a defendant handed to a broker the following letter:—"I authorise you to procure a buyer of my divided portion of the above premises for Rs. 45,000 and on your sending the same, I shall pay you as remuneration at 1 per cent. on the purchase money". It was held that the offer contained in the letter amounted only to an offer to be put in touch with intending purchasers and it was in no sense an authority to the brokers to sell the principal's property and make a binding contract of sale.⁵

A commission agent is not bound to supply goods at a particular rate or otherwise at the market rate at the time of the supply.⁶

Where a shroff employed by the Government only to accept Badshahi coins passed a number of Shikkar coins as Badshahi coins; held, that it was implied term of the contract that if he passed any other and the Government suffered loss, he would make it good.⁷

There is no discretion vested in the commission agents to take the goods given to them for sale in a particular place by the principal to another place if in their option it would be more advantageous to do so.⁸

Where the plaintiffs as agents for sale of goods had definite instructions from the principal not to rail the goods to a certain place, they were bound to carry out those instructions and when they infringed, the principal could not be liable for freight charges.⁹

An agent, bound by his contract to keep proper books of accounts, omits to scrutinize, examine or check the accounts of his subordinates whom he implicitly trusts. Taking advantage of this, the subordinates commit gross frauds on him and his employers. The frauds and defalcations being due to the agent's

1. *Harrods, Ltd., v. Lemon*, (1931) 2 K. B. 157.

2. *Haribanga Shibdas Rakshit v. Nalini Mohan Shaha*, 40 I. C. 799.

3. *Firm of Jankidas Banarsidas v. Dhunamlat & Co.*, 37 I. C. 241.

4. *Kishori Lal v. Jivan Lal*, 67 I. C. 231.

5. *Puran Chandra Dutt v. Indra Chandra Roy*, 1922 Cal. 397; *Durga Charan Mitra v. Rajendra Narain Sinha*, 1923 Cal. 57.

6. *Firm Babulal Kidarnath v. Firm Net Ram Khayali Ram*, 1922 All. 400.

7. *Chuni Lal v. Secretary of State*, 35 Bom. 12.

8. *Thandavaraya v. Ahmed Batcha*, 1937 M. W. N. 578.

9. *Firm of Mathura v. Firm of Kishan*, 1925 Lah. 332=36 I. C. 567.

failure to perform his duty he is liable to make good the loss thereby caused.¹

In *Bostock v. Jardine*² the defendants were authorised to buy a certain quantity of cotton for the plaintiff. "Instead of complying with their instructions, they bought a much larger quantity for the plaintiff and divers other people", so that there was no contract on which the plaintiff could sue as principal. Accordingly, "though a contract was made, it was not the contract the plaintiff authorised the defendants to make", and the plaintiff was entitled to recover back a sum paid to the defendants on account of the purchase-money.

Departure
from instruc-
tions.

In old equity cases where a landowner's steward was also lessee of part of the property, and in that capacity had made profitable arrangements with adjacent owners, it was held "that the benefit he had got as lessee by the use of the property should, upon reasonable terms, be acquired for his landlord and not for himself."³

Section 211 of the Indian Contract Act, 1872, lays down that, in the absence of any directions by the principal, an agent is bound to conduct the business of his principal according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business.

Custom
trade.

The subject of authority conferred by custom or usage has already been dealt with in Chapter v⁴ and need not be recapitulated here.

Where it is proved that according to a mercantile usage the agent was justified in mixing up the bales of cotton which his principal had instructed him to sell on his behalf with other bales with which his principal has nothing to do, the agent is not liable for any loss sustained by the principal on account of so mixing up the bales by the agent.⁵

Where for the purpose of sale on commission, the defendants received from a broker delivery order for goods belonging to the plaintiff and paid the price to the broker, *held*, in the absence of a custom or proof of authority, the defendants are not discharged of their liability to the plaintiff, for the price of the goods.⁶

55. Skill and diligence required from agent.

An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make

Agent to
exercise
skill and
diligence.

1. *Taylor v. United Africa Co.*, A. I. R. 1937 P. C. 78=168 I. C. 494. See also *Punjab National Bank v. Dwan Chand*, A. I. R. 1931 Lah. 302=134 I. C. 577.

2. (1865) 3 H. & C. 700.

3. *Beaumont v. Boulbee* (1802) 7 Ves. 599, at p. 608.

4. See notes on pages 146 to 161.

5. *Panna Lal v. Daulat Ram*, 1929 Lah. 591=122 I. C. 85.

6. *Haribanga v. Nalini* 40 I. C. 799 (Cal.).

compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

ILLUSTRATIONS

- (a) A, a merchant in Calcutta, has an agent, B, in London to whom a sum of money is paid on A's Account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as e. g., by variation of rate of exchange—but not further.
- (b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.
- (c) A, an insurance-broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.
- (d) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

(S 212, *Indian Contract Act, 1872*).

Bowstead thus states the English law on the subject—

“Every agent acting for reward is bound to exercise such skill, care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him,

“Every agent acting gratuitously is bound to exercise such skill as he actually possesses, and such care and diligence as he would exercise in his own affairs; and if he has held himself out to the principal as possessing skill adequate to the performance of the particular undertaking, then such care and skill as is reasonably necessary for the performance thereof.

“Every agent is bound to exercise reasonable care and diligence in protecting the moneys and property of his principal in his possession or custody, or under his control,

“What is the usual or necessary, or a reasonable, degree of skill, care, or diligence, is a question of fact depending upon the nature of the agency, and the circumstances of the case”.¹

1. Art. 47, page 94.

Agent acting gratuitously and one acting for reward.

The English Law thus draws a distinction between an agent acting gratuitously and one acting for reward as regards the amount of skill and diligence. Thus, where a general merchant undertakes, without reward to enter a parcel of the principal's goods, with a parcel of his own but, by mistake, enters both parcels under a wrong denomination and the goods are seized, he is not responsible to the principal for the loss, having taken the same care of the principal's goods as of his own.¹ But a house, agent who is employed on commission to let houses is bound to use reasonable care to ascertain the solvency of the would-be-tenants.²

The following illustrations will be helpful to further clarify the law on the subject :—

1. An insurance broker undertakes to effect an insurance. He is bound to use due diligence to perform what he has undertaken within a reasonable time³, and if he is unable to effect the insurance according to the instructions, to give notice to his principal of that fact.⁴

2. A share broker is employed to buy certain railway scrip. He buys on the market, in the ordinary course of business, what is usually sold as such scrip. He is not responsible to the principal because the scrip turns out not to be genuine, having had no notice that it was not genuine, and having bought it in the ordinary course of business.⁵

3. An insurance broker retains in his own hands a policy effected by him. He is bound to use due diligence to procure a settlement and payment of a loss arising thereunder.⁶

4. An insurance broker is employed to insure from a particular point. It is his duty to insert in the policy all the clauses usually inserted in an insurance from that point.⁷

5. An agent is employed to purchase a public house. It is his duty to examine the takings etc., and the fact the principal has himself examined them on the advice of the agent does not exonerate him from liability for a breach of that duty.⁸

6. A broker is employed on commission to purchase and ship scrap iron. He is not bound to inspect the iron for the purpose of ascertaining whether it is of the quality bought, because it is not part of a broker's ordinary business to inspect goods bought by him as such.⁹

7. A acts as a patent agent. He is bound to know the law relating to the practice of obtaining patents, and is responsible

1. *Shields v. Blackburne*, 1 H. Bl. 159. See also *Bullen v. Swan Electric Engineering Co.*, 23 T. L. R. 257.
2. *Hayes (or Hays) v. Tindall* (1861), 30 L. J. Q. B. 369.
3. *Turpin v. Bilton* (1843), 5 M. & G. 455.
4. *Callander v. Ostricks* (1839), 8 L. J. C. P. 25.
5. *Lambert v. Heath* (1846), 15 M. & W. 498; *Mitchell v. Newhall* (1846), 15 L. J. Ex. 292—15 M. & W. 308.
6. *Bowfield v. Creswell* (1810), 2 Camp. 545.
7. *Mallough v. Barber*, (1815), 4 Camp. 150.
8. *Smith v. Barton* (1866), 15 L. T. 294.
9. *Zuelchenbart v. Alexander* (1860), 30 L. J. Q. B. 254.

to his principal for injury caused through his ignorance of such law. Every person who acts as a skilled agent is bound to bring reasonable skill and knowledge to the performance of his duties. ¹

8. A acts as a valuer of ecclesiastical property. He is bound to know the general rules applicable to the valuation of dilapidations but is not expected to have an accurate and precise knowledge of the law relating thereto. ²

9. A broker was employed to sell certain goods "to arrive", of "fair average quality in the opinion of the selling broker". A dispute having arisen, the broker inspected the goods and reported that they were not of fair average quality. Held, that he was not bound to exercise any skill in order to form a correct opinion, it not being part of the ordinary business of a broker to act as an arbitrator. ³

10. A rides a horse gratuitously for the purpose of exhibiting it. He is bound to exercise such skill as he actually possesses, and is responsible to his principal for any injury caused by his neglect to do so. ⁴

11. A offers, without reward, to lay out £700 in the purchase of an annuity, and undertakes to obtain good security. He is bound to use reasonable care to lay out the money securely. ⁵

12. Agents engaged for purchase of goods are only bound to act to the best of their judgment and to use proper care and skill as agents in purchasing what they are ordered to purchase and their action cannot be repudiated unless they have been guilty of negligence. ⁶

13. If a person employs as his agent to conduct a legal business one who is not a duly qualified practitioner, the agent is responsible only for a reasonable and *bona fide* exercise of such skill as he possesses. ⁷

14. A person with special skill when employed for the reward is bound to exercise his skill in the execution of the duties entrusted to him and he ought not to rely on the statement of others. ⁸ Where a skilled labourer, artisan or artist is employed there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes. ⁹ It has, however, been held that in India the work of the persons engaged to supervise a building is not to be measured by the standard applied to architects and engineers in England. The English practice does not obtain in India, except in a small extent. In India

1. *Lee v. Walker* (1872) L. R. 7 C. P. 121; *Lamphier v. Phipps* (1839), 8 C & P. 475; *Parker v. Rolls* (1854), 14 C. B. 591.

2. *Jenkins v. Betham* (1855), 24 L. J. C. P. 94.

3. *Pappa v. Ross* (1872), L. R. 7 C. P. 32, 525.

4. *Wilson v. Brett* (1843), 11 M. & W. 113.

5. *Whitehead v. Gresham*, (1825), 2 Bing 434, Ex. Ch.

6. *Betts v. Arbuthnot & Co.*, 19 W. R. 65; *W. R. Arbuthnot v. C. D. Betts*, 6 B. L. R. 273 (1897-1900) L. R. R. 67.

7. *Fenwick v. Mirza Ehsan Bakhsh*, 1866, P. R. 25;

8. *The Sitarampur Coal Co.*, v. T. H. Colley, 13 C. W. N. 59

9. *Panduranga v. Jairamdas*, 1925 Nag. 166; *Harmer v. Cornelius*, 116 B. R. 654, ref. to.

the question of employee's liability for defects in the completed buildings has to be determined with reference to the relationship between him and his employer.¹

15. Where a person in possession of a hundi drawn in his favour by his principal sold the hundi to a firm on 10 days' credit and the firm after cashing the hundi and before full payment to the drawee became bankrupt, it was held that the drawee of the hundi was not responsible to account to the drawer, as it had not been shown that he acted without reasonable care and prudence or had deviated from any known usage of trade.²

16. A tahsildar appointed by a landlord though not experienced to institute suits for arrears of rent, is bound to give information to his principal in proper time that unless suits are brought in respect of certain arrears of rent they would become barred by limitation, and omission to do so would make him liable for damage in respect of the arrears of rent thus becoming barred by limitation, the cause of action arising when the arrears of rent become barred, and a claim for damages on account of such loss caused by his laches can be included in a suit for accounts against him.³ The obligation to act with reasonable care and diligence will necessarily include the duty, incumbent on all agents, of keeping the principal informed of all the facts connected with the business of agency.

17. Where an agent insured certain goods and charged the principal with the premium in his account, but the goods being lost it was found that owing to some irregularity the claim for the insurance money against the insurance office could not be enforced, it was held that the agent was bound to effect the insurance in a proper manner so that the money could be recovered in case of the goods being lost and that unless he showed that the mistake was not caused by his negligence he was responsible to the principal for the loss.⁴

18. Where-ever it can be shown that a loss sustained by the principal is directly traceable to disregard on the part of the agent of directions issued to him regarding the conduct of business such misconduct on the part of the agent is actionable even though it may have been due to nothing worse than mere negligence or overconfidence in the honesty of others.⁵

19. Where the accountant of a Municipal Board was able to embezzle large sums of municipal revenues owing to disregard by the Executive Officer of the rules and directions laid down by the municipality for his guidance, it was held that the executive officer was liable for such which could be prevented from being embezzled by a proper regard of such rules and directions.⁶

20. An agent guilty of negligence, *e. g.*, sending the goods in an open truck at the owner's risk, must make compensation

1. *Nagendra Nath v. Nagendra*, A. L. R. 1926 Cal. 989.

2. *Hurdial and Bhakndial v. Khillo Mullick*, 98 F. R. 1869.

3. *Ramesh Chandra Acharjee Chowdhury v. Easin Sarkar*, 52 I. O. 71.

4. *Shivaramnath v. Keshavji*, 1893 Bom. P. J. 36.

5. *Mukerji v. Municipal Board, Benares*, 56 All. 175=22 A. L. J. R. 26.

6. *Massey v. Bannor*, 1 J. & W. 241; See *Katlar*, p. 523.

to the principal in respect of the direct consequence of his neglect.¹

21. If an agent entrusted with the investment of moneys chooses to rely upon his general knowledge of the value of lands upon the security of which the money is invested he does so at his own risk as it is his duty to have a proper valuation made.²

22. When an agent fails in his duty of maintaining proper account books and exercising proper checks on the acts of his subordinates as stipulated and they commit frauds and defalcations, the agent is liable for the negligence and breach of contract and frauds and defalcations resulting therefrom.³

23. When a commission agent was accustomed to send goods to his principal uninsured and this method was acquiesced in by the principal, the commission agent was not liable for the loss of goods for which the principal could not recover damages from the railway company due to non-insurance.⁴ The measure of reasonableness required is of course to be decided on what the parties themselves in the usual course of conduct and trade custom considered reasonable for when according to the custom of the trade a certain course of action was considered proper, the agent cannot be called upon to answer for any loss which results from adopting that course of action.

24. A commission agent authorised to realise amounts on his principal's behalf would be acting prudently and not negligently if he collected as much as he could from a merchant and gave credit for the balance even though the merchant became insolvent subsequently.⁵

25. An agent is not responsible for any loss caused on account of an error of judgment provided he exercises reasonable skill and diligence.⁶

26. In the absence of negligence, loss by fire of goods purchased by an agent employed for the purpose does not fall on him.⁷

27. It is doubtful whether refund of fees can be claimed by a client from his pleader when he is prevented from appearing by sudden illness, death or other unavoidable cause.⁸

28. "When a skilled labourer, artisan, or artist is employed, there is, on his part, an implied warranty that he is of skill reasonably competent to the act he undertakes. An express promise or express representation in the particular case is not necessary. . . . The failure to afford the requisite skill which

1. *Siraj Mal v. Fateh*, 1930 Lab. 290.

2. *William Abercrombie v. Jack*, 1932 P. C. 194=137 I. C. 531.

3. *Taylor v. United Africa Co.*, 1937 P. C. 78=168 I. C. 494.

4. *Venkatachalam v. Pammuseami*, 1925 Mad. 46=82 I. C. 536.

5. *Nand Ram v. Gokal Chand*, 1933 Lab. 841=149 I. C. 688; *Lagunas Nitrate Co., v. Lagunas Syndicate*, (1899) 2 Ch. 392.

6. *Firm of Bajuram v. Abdul Rahim*, 31 I. C. 450=9 S. L. R. 77.

7. *Dhanpat v. Hari Charn*, 1925 Cal. 284=82 I. C. 685.

8. *Devil Pershad v. Ram Rakha*, 38 I. C. 993=20 P. W. R. 1916.

had been expressly or impliedly promised is a breach of legal duty and therefore misconduct". And the employer is justified in dismissing an employee who shows himself incompetent, though he may have been engaged for a term not expired.¹ But the obligation of diligence may be waived by express agreement.² How far an agent employed in the general supervision of work has to answer for the skill and diligence of workers under him must depend on the nature of the work, and on local usage.³ On the other hand, any express undertaking or guarantee by the agent will bind him according to its terms; and an agreement exempting an agent from the consequences of his own fraud or wilful wrong seems on principle to be void.⁴

29. An agent is bound to know so much of the law material to the business in hand as will enable him to protect the principal's interest and make the transaction binding on the other party.⁵

30. An agent who is definitely authorised to enter into a particular transaction is not liable to the principal for any loss which may be suffered in consequence of the imprudent nature of the transaction.⁶

31. Where an agent pays his principal's money into his own account into a bank, it being his duty to pay it into a separate account, he is responsible for the failure of the banker though acting gratuitously.⁷

32. A broker, authorised to sell and deliver certain goods and contracting to sell them for cash on delivery, is bound not to deliver the goods without payment and renders himself liable in damages to his principal if he delivers them without such payment.⁸

33. If an agent appoints a sub-agent the agent is bound to exercise the same amount of discretion as an ordinary prudent man would exercise.⁹ Every agent who employs a sub-agent is bound by the latter's acts, and is therefore liable to the principal for any money received by the sub-agent to the principal's use, and is also responsible to the principal for the negligence on other breaches of duty on the part of the sub-agent in the course of his employment as sub-agent.¹⁰

Sub-agent.

As it is the duty of every agent to bring to the performance of his undertaking and to exercise in such performance that degree of skill, care and diligence which the nature of the undertaking and the time, place and circumstances of the per-

Negligence and gross negligence.

1. *Harmer v. Cornelius* (1858) 5 C. B. N. S. 236=116 R. R. 654, Cnr. Per Willes J.
2. *Austin v. Manchester, etc., Ry., Co.* (1850) 10 C. B. 454=84 R. R. 645.
3. *Nagendra Nath Singha v. Nagendra Bala Choudhuran*, 1926 Cal. 988=97 I. C. 200.
4. *Story on Agency*, §. 188.
5. *Park v. Hammond* (1816) 6 Taunt 495; *Neilaon v. James*, (1892) 9 Q. B. D. 546.
6. *Owerend v. Gibb*, (1872) L. R. 5 H. L. 480.
7. *Wren v. Kirton*, 11 Ves. 377; *Robinson v. Ward*, 2 C & P 59; *Mac Dannell v. Harding & L. J.* Ch. 10.
8. *Boorman v. Brown*, 3 Q. B. 511; *Kidd v. Horne*, 2 T. L. R. 141.
9. *Bent Prasad v. Navaln Das*, 1980 Lah. 974=129 I. C. 287.
10. *Hugh Francis Huole v. Royal Trust Co.*, A. I. R. 1980 P. C. 274.

formance ordinarily and reasonably demand, a failure to do so whereby the principal naturally and proximately suffers loss or injury constitutes negligence for which the agent is responsible.¹

As already noticed, a gratuitous agent is liable only for gross negligence in the course of the agency, and not for mere want of skill, unless he is in a situation from which skill may be implied.² But an omission to exercise such skill as he actually possesses, or had held himself out to possess or skill as may reasonably be implied from his profession or enjoyment, or an omission to exercise such care and diligence as he is in the habit of exercising in regard to his own affairs, is deemed to be gross negligence for the consequences of which he is responsible to the principal.³ So, where a customer deposited certain securities for safe custody with his bankers who undertook to do so without any reward, and the securities were stolen, it was held that the bankers were not liable as the theft was not proved to be due to their gross negligence.⁴ Thus, gross negligence may be defined as the omission by the agent to exercise such skill as he actually has,⁵ or has held himself out to have,⁶ and such care and diligence as he is in the habit of exercising with regard to his own affairs.⁷

56. Measure of damages.

General.

It is thus clear from what has been stated above that wherever an agent violates his obligations to his principal, whether by exceeding his authority or by misconduct or omission or by mere negligence or in any other manner, and loss or damage results to his principal, he is responsible for such injurious consequences, and is bound to indemnify the principal.⁸ But in order to enable the principal to recover there must be an actual loss sustained by him.

The principle upon which compensation is given to the principal is the same as in other cases, namely, that he should be restored to the position in which he would have been had the agent not been guilty of the breach of duty towards him.⁹ Therefore in an action by the principal against his agent for the latter's breach of duty, or for negligence, the measure of damages of the *actual loss directly and naturally arising from the acts or omissions complained of*, whether the loss or damage be to the property of the principal, or whether it is the result of the principal's rendering compensation to third parties owing to the

1. See Katiar, p. 523 and the American authorities cited therein.

2. *Elsie v. Gowerd*, 5 T. R. 143. See also Katiar, p. 525.

3. See Bowstead, Art. 47, p. 94; *Wilson v. Brett*, 11 M. & W. 113, *Dartnall v. Howard*, 4 B. & C. 345.

4. *Giblin v. McMullen* L. R. 2 P. O. 317; *Bullen v. Swan Electric Engraving Co.*, 23 T. L. R. 258 *Compare Re. United Service Co., Johnston's Claim*, L. R. 6 Ch. 212.

5. *Wilson v. Brett* (1848), 11 M. & W. 113.

6. *Beal v. Smith Dutton Ry. Co* (1864), 9 H. & C. 377.

7. *Shiells v. Blackburn* (1789), 1 H. Bl. 159; *Moffat v. Bateman* (1869), L. R. 3 P. O. 115, *Giblin v. McMullen*, (1869), L. R. 2 P. O. 317.

8. *Columbus Co. v. Clowes* (1903) 1 K. B. 244.

9. *Chelapathi v. Surayya*, 12 M. L. J. 375.

agent's acts or omissions. It need not be a loss which is the immediate consequence of the agent's wrongful conduct or breach of duty; it is enough if it is fairly attributable to his conduct and is its just consequence¹ But it must be a real and actual loss and not a mere probable or possible one.² If, for instance, an agent deposits goods in an improper and unsafe place knowing it to be such, and the goods are lost by an accidental fire, he would be responsible for the loss.³ The fact that the loss of the goods is directly due to the accidental fire will not make the agent the less liable. In such a case though the loss is not the immediate consequence of the agent's negligence, but of the fire, yet it may be said that but for the agent's negligence the loss would never have occurred. Thus the agent who is guilty of a breach of duty towards his principal will be responsible for such loss or damage as might reasonably have been anticipated to accrue from his default or negligence.⁴

The agent is, however, not liable in respect of loss or damage which is indirectly or remotely caused by his neglect, want of skill, or misconduct.⁵ In *Johnston v. Braham & Campbell*⁶ the defendant, an agent of the plaintiff, had by his negligence misled the plaintiff into entering into an adventure from which loss ensued. It was held that the plaintiff was entitled to recover that loss, because it was the amount he actually lost out of his pocket, and he was entitled at best to be restored to the position in which he would have been if the defendant had not been guilty of the breach of duty towards him. But it was further held, that he could not add to that loss the speculative profits which he would have made if he had had his time or money at his disposal, instead of having embarked in the adventure which he had incurred.

Again on the principle of remoteness of damage, an agent cannot be made liable to his principal in respect of damages which the principal had been compelled to pay to third parties as a result of a tort wilfully or deliberately committed, even though the negligence of the agent may have been responsible for such party being enabled to recover such damages from the principal. The damages in such a case arise directly from the wrongful act of the principal himself and remotely from the negligence of the agent.⁷

Where there is a clear breach of duty on the part of the agent, it has been held under English law, that nominal damages can be recovered even though no actual loss has been incurred, for in such cases, the law presumes an incurring of general damage, at least to a nominal extent as a result of the breach of duty.⁸

1. *Johnston v. Braham & Campbell*, (1916), 2 K. B. 529.

2. Story on Agency, Art. 222.

3. *Ibid*; Art. 218.

4. *Cassabogian v. Gibb*, (1882), 11 Q. B. D. 797

5. S. 212 Indian Contract Act, 1872.

6. (1916) 2 K. B. 529.

7. *Weld-Blundell v. Stephens* (1919) K. B. 520

8. *Van Wart v. Wolley* (1830), M. & M. 520, *Marzetti Williams* (1830), 1 B. & Ad. 415,

The action in such a case being more in the nature of one founded upon tort than upon a breach of contract, the same rule may perhaps be applied in India also.¹

Again, actual loss need not also be proved in cases arising out of a banker's negligence or refusal to honour his customer's cheques even though the banker had sufficient funds in his hands to meet the cheques. Such cases have been held to be those in which substantial damages may be recovered without proof of actual loss, for an injury to the credit and reputation of the principal is itself presumptive proof of substantial damage.²

Agent can show that principal suffered no real damage.

On the principle that where there is no benefit there is no damage, the agent may show that the principal could not have derived any benefit even though his instructions have been strictly followed, and that, therefore disobedience thereof could not have produced any real loss.³

Agent can show that the loss is inevitable

As a corollary, it follows that the agent may also show that damage or loss to the principal would be inevitable even if his orders had been complied with. The principle, as stated by the Madras High Court is that, where a party would have lost a claim apart from the conduct of another man, the other man is not liable. Thus, where a certain pro-note was accepted by the principal even though it was void as contravening Section 26 of the Paper Currency Act, and in discharge of that pro-note his agent forged another pronote and thus misled him into filing a suit on the forged pro-note, it was dismissed on that ground, and when the creditor did not see the alternative claim on the basis of the original consideration, it was held that the loss of the creditor was not due to the forged pro-note but to his acceptance of the original pro-note and therefore the agent was not liable for the loss of the debt.⁴

The principal has a right to recover the loss accruing to him from all acts done by his agent whether without authority or in excess of his authority. Disobedience to express instructions also makes the agent liable for the loss sustained by the principal.⁵

Measure of damages.

The measure of damages in all these cases is the actual loss sustained. So, where an agent in breach of his duty sold goods of the principal below the limit placed upon them by the principal, the measure of damages is the actual loss sustained and not the difference between the price at which they were sold and the limit of the price placed upon them.⁶ The true measure in such a case is the difference between the price which the goods fetched at the agent's sale and that which the goods

1. *Chelupathi v. Swayya*, 12 M. L. J. 375, *Manchubhai Nivalechand v. John H. Todd*, J. L. R. 20 Bom. 633.

2. *Larios v. Bonany Y. Gurety* (1873) L. R. 5 P. O. 346; *Robin v. Stevard* (1854) 14 O. B. 595.

3. See O. K. Das's 'Law of Damages and compensation,' p. 1023.

4. *Verraswami Pillai v. Chidaram Chettiar*, A. I. R. 1926 Mad. 494.

5. S. 211, Indian Contract Act, 1872.

6. *Manchubhai Nivalechand v. John H. Todd*, I. L. R. 20 Bom. 633.

would have fetched at the time when the principal might reasonably be held to have been willing to sell.¹

Again, where an agent who had been instructed not to part with the goods until they were paid for, parted with them without receiving payment, the measure of damages is the value of the goods, if the purchaser had failed to pay the price.² So also, where an agent, entrusted with certain goods for sale, sells them by auction for an inadequate price without having made an estimate of their value in accordance with the custom of the trade, the measure of damages is the loss sustained.³

On the same principle where the agents, who were authorized to buy a certain quantity of cotton purchased a much larger quantity contrary to express instructions, and so mixed up the cotton with other's cotton as to deprive the principal of all remedy on the contract, the principal was held entitled to back the sum he had paid to the agent on account of the purchase money.⁴ Also where the principals have issued instructions to a Bank, their agents to meet cheques counter-signed by their managing agents, but the Bank, contrary to the express instructions, issued a large number of blank cheques, the measure of the liability of the Bank is the value of the amounts improperly paid by them.⁵

Where an agent who was instructed to warehouse goods at a particular place, warehoused a portion at another place and the goods were destroyed by fire without negligence, the measure of damages is the value of the goods lost.⁶ Where an agent instructed to insure certain goods fails to do so, the principal is entitled to recover their value in the event of their loss.⁷ Where an agent, in disobedience of instructions accepted a cheque instead of cash at the close of the transaction, and the cheque was dishonoured, he was held liable for the value of the cheque.⁸ Where one of the instructions to an agent employed for the sale of cylinders of gas used for aerated waters, was that he should return the empty cylinders to his principal, and the cylinders were allowed to remain with the sub-agents, the agent or his representatives must pay the principal the value of the empty cylinders.⁹

The actual loss sustained by the principal includes also the amount of compensation paid by to him to third parties owing to the breach committed by the agent. Where a person

Principal entitled to recover compensation paid to third parties

1. *Chelapathi v Surayya*, 12 Mad. L. J. 375. Compare, *The Fabrique Unite Blach E Celort v. Jaqnohan Dass*, 1 Bom L. R. 718, where the measure was held to be the difference between the price actually realized and the price which would have been realized had the agent used reasonable diligence and skill.
2. *Stearns & Co. v. Heintzmann*, (1864) 17 C B (N S.) 56.
3. *Soliman v. Barker*, (1862) 2 F. & F 926.
4. *Bostock v. Jardine*, (1865) 3 H. & C. 700. But see, *Panna Lal v. Daulat Ram*, 1929 Lah. 591, where this case was distinguished and not applied owing to the existence of a mercantile usage which permitted the agent to mix up the goods of the principal with those of other people.
5. *Australian Bank of Commerce Ltd. v. Peral*, (1926) A. C. 787, 95 L. J. P. C. 185.
6. *Lilley v. Doubleday*, (1881) 7 Q. B. D. 510.
7. *Smith v. Lascelles*, (1786) 2 T. R. 187.
8. *Pape v. Westacott*, (1894) 1 Q. B. 272.
9. *Pranjos Bhagpurji Gandhi v. Karn Debi*, 56 L. C. 445.

authorised another to purchase tobacco of a certain quality, and that other employed a sub-agent to purchase the same, but the sub-agent supplied tobacco of an inferior quality which the original principal refused to accept and recovered damages against the sub-agent, the measure of damages recoverable against the sub-agent is the amount of damages and costs which the agent has been obliged to pay to his principal.¹

A broker who was engaged to effect insurances failed to disclose a material letter, and the assured, in consequence, was unable to recover anything from some of the underwriters upon the policies issued by them. He had also to make restitution to others who had paid their share of the loss without action, upon the refusal of the broker to defend their proposed actions. It was held that the broker was liable for the actual loss sustained by the principal which included the amounts of the losses which he had repaid and those which he had failed to recover.² The principal is, however, not entitled to recover against his agent the costs of the unsuccessful action which he had brought upon the policy, because if the policy was valid there was no necessity to bring the action to entitle the principal to recover, and since it is invalid it is really futile to bring one. The result might, perhaps, be otherwise if the action had been brought at the desire or with the concurrence of the agent.³

Agent entitled to rectify his mistake.

Though the agent, who makes a mistake in carrying out his principal's instructions, must pay the penalty for it, yet he is entitled to rectify the mistake as soon as he discovers it; in fact it appears to be a reasonable and proper course for him to adopt, if it will have the effect of putting the principal in exactly the same position the principal would have been in before the mistake was committed. But, if in doing so, any loss arises, he would have to bear it himself.⁴

Measure of damages for negligence and other breaches of duty.

Under section 212 of the Indian Contract Act, an agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. Again, the agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or mis-conduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or mis-conduct. It is, however, to be observed that an agent's responsibility is not an absolute one. He does not undertake to make complete indemnity against losses however occasioned. He is entitled to show that, though he has been negligent, and though the interests of the principal have suffered, the loss sustained by the principal was not the result of his negligence, but has been immediately occasioned

1. *Mainwaring v. Brandon* (1818) 2 Moore, 125.

2. *Mayden v. Forrester*, (1814) 5 Taunt, 615.

3. *Seller v. Work, Marsh Ince.*, 243, 4th Edn.

4. *Allahabad Bank Ltd., v. Sheo Baksh Singh*, A. I. R. 1926 Oudh, 375.

by the happening of some event for which he was not responsible.

In all these cases also the measure of damages is the actual loss sustained. Thus, where a firm instructed their commission agents to buy and send certain goods by railway, but the agent negligently sent them in an open truck at the owner's risk and the goods were damaged during transit, the measure of damages was held to be the difference between the price of the goods in their undamaged condition and their market value at the time when they reached their destination.² Similarly, where a Tehsildar appointed by a landlord, whether or not he has power to institute suits for arrears of rent, does not inform the landlord that unless suits are brought in respect of certain arrears of rent they would become barred, failure on his part to do so would constitute negligence and the measure of damages in the value of the arrears lost.³ Again, where an agent was directed to take out an insurance on certain buildings and machinery, for a particular sum, but the agent negligently effected the insurance for the particular amount named, over the buildings and machinery and also over certain quantities contained in the building, of wheat and wheat products belonging to third person, and the whole of the mills including the wheat and its products were destroyed by fire and the principal was able to realize only an amount proportionate to the value of the buildings and machinery, the agent was held liable for the difference in the amount of insurance which the principal had lost owing to the agent's instructions. Had the principal's instructions been followed the insurance company would have paid the entire amount to him, and therefore the loss was directly due to the negligence of the agent.⁴

A stock-broker, employed to sell certain shares, failed in effecting a valid contract of sale owing to his omission to comply with the requirements of a particular statute. The custom set up by the broker, of disregarding the statute, having been found unreasonable and illegal, it was held that the principal was entitled to recover the amount he would have obtained for the share if they had been validly sold.⁵

The agent is also responsible for every act of his, which is in the nature of fraud against the interests of the principal, and if any loss arises to the principal as a result of the fraudulent act, he must make it good. Thus, where an agent falsely represents that he has concluded a contract for his principal, the measure of damages is the loss sustained by the misrepresentation, and not also the profits which the principal would have made had the representation been true.⁶ Where agents were employed to find a purchaser for property, and, during the continuance of their agency, they receive information which tends to show that the value of the property had been greater than had been

Measure of
damages for
fraud of
agent

1. See *Cunnigham & Shephard's Indian Contract Act*, Introduction, P. LXXII.

2. *Surajmal Chandan Mal v. Fatah Chand Jamiat Rai*, A. I. R. 1930 Lah. 280.

3. *Ramesh Chandra Acharjee v. Eusin Sarkar*, 52 I. C. 71. But see, per Wallis C. J. in *Venkataswami v. Ramchandra Rao*, 18 I. C. 520 at p. 521.

4. *Punjab National Bank v. Dewan Chand*, A. I. R. 1931 Lah. 302.

5. *Neilson v. James*, (1882) 9 Q. B. D. 548.

6. *Charles Salvesen & Co., v. Rederi Aktieselskabet*, (1905) A. C. 305.

supposed, or is otherwise of a nature to materially influence the judgment of the principal in going on with the contract, they are bound to communicate that information to the principal and if they do not do so they are guilty of fraud and breach of duty and consequently liable for damages. The measure of damages is the difference between the amount which the vendee gave and the amount which the person making the subsequent offer would have given if the agent had done his duty.¹ So also, where an agent acting in collusion with a third party does an act without the consent of the principal, and the act is detrimental to the interests of the principal, the principal is not bound by such act and is entitled to recover the loss.²

Conversion
by agent.

Where an agent converts the goods of his principal, it has been held that, being a wrongful act, there is no fixed rule for determining the measure of damages, but must depend upon the circumstances of each case. In the case of conversion of goods of ordinary merchandise by the agent, the highest market value of the goods on any day between the date of conversion and the date of verdict is not always the proper measure. Where the plaintiff can re-purchase the goods after getting information of the wrongful sale, the market value of the goods on some subsequent day, should be the measure of damages, reasonable time being allowed to him for making the re-purchase.³ Where the goods are being conveyed from one place to another and there is a wrongful conversion by the agent, the market-value of the goods, at the place to which they were being conveyed at the time of conversion is the measure of damages, after deducting the cost of carriage from the place where the goods were converted to the place of destination.⁴

Agent not
liable for
remote loss.

As has been stated above,⁵ an agent is not liable for any remote consequences resulting from his negligence or wrongful act, but is only liable for the natural and immediate consequences. Illustration (a) to section 212,⁶ Indian Contract Act, allows only the direct loss which resulted from the agent's withholding of the money due to the principal, and expressly stated that the agent was not liable for any further consequences such as the loss resulting from the principal becoming an insolvent.⁷ So the agent is not liable for the loss of credit which the principal had suffered, or for any other loss resulting from the suspension of the business of the principal as a consequence of the agent's wrongful withholding of the money belonging to the principal.⁸

1. *Keppel v. Wheeler*, (1927) 1 K. B. 577 (C. A.). See *Abdul Rahiman v. Rangiah Gounder*, 22 I. C. 597, as to the duty of an agent in the converse case, where he was engaged for the sole purpose of procuring a sale of property for the principal.
2. *Ram Kaur v. Raghunath Singh*, 56 I. C. 631.
3. *Tadi Sarreddi v. Chelamcharlu Brahmiah*, A. I. R. 1928 Mad. 1152.
4. *Bombay Burmah Trading Corporation v. Mirza Mohammad*, I. L. R. 4 Cal. 116 at p. 120.
5. See notes on p. 346.
6. Cited at p. 336.
7. For comments upon this illustration, see C. K. Rao's 'The Law of Damages & Compensation,' P. 807.
8. Story on Agency, Arts. 220 and 221.

by the happening of some event for which he was not responsible.¹

In all these cases also the measure of damages is the actual loss sustained. Thus, where a firm instructed their commission agents to buy and send certain goods by railway, but the agent negligently sent them in an open truck at the owner's risk and the goods were damaged during transit, the measure of damages was held to be the difference between the price of the goods in their undamaged condition and their market value at the time when they reached their destination.² Similarly, where a Tehsildar appointed by a landlord, whether or not he has power to institute suits for arrears of rent, does not inform the landlord that unless suits are brought in respect of certain arrears of rent they would become barred, failure on his part to do so would constitute negligence and the measure of damages is the value of the arrears lost.³ Again, where an agent was directed to take out an insurance on certain buildings and machinery, for a particular sum, but the agent negligently effected the insurance for the particular amount named, over the buildings and machinery and also over certain quantities contained in the building, of wheat and wheat products belonging to third person, and the whole of the mills including the wheat and its products were destroyed by fire and the principal was able to realize only an amount proportionate to the value* of the buildings and machinery, the agent was held liable for the difference in the amount of insurance which the principal had lost owing to the agent's instructions. Had the principal's instructions been followed the insurance company would have paid the entire amount to him, and therefore the loss was directly due to the negligence of the agent.⁴

A stock-broker, employed to sell certain shares, failed in effecting a valid contract of sale owing to his omission to comply with the requirements of a particular statute. The custom set up by the broker, of disregarding the statute, having been found unreasonable and illegal, it was held that the principal was entitled to recover the amount he would have obtained for the share if they had been validly sold.⁵

The agent is also responsible for every act of his, which is in the nature of fraud against the interests of the principal, and if any loss arises to the principal as a result of the fraudulent act, he must make it good. Thus, where an agent falsely represents that he has concluded a contract for his principal, the measure of damages is the loss sustained by the misrepresentation, and not also the profits which the principal would have made had the representation been true.⁶ Where agents were employed to find a purchaser for property, and, during the continuance of their agency, they receive information which tends to show that the value of the property had been greater than had been

Measure of damages for fraud of agent.

1. See *Cunnigham & Shephard's Indian Contract Act*, Introduction, P. LXXII.
2. *Surajmal Chandan Mal v. Fateh Chand Jamiat Rai*, A. I. R. 1930 Lah. 280.
3. *Ramesh Chandra Acharjee v. Ensin Sarkar*, 52 I. C. 71. But see, per Wallis C. J. in *Veikatanesami v. Ramchandra Rao*, 18 I. C. 520 at p. 521.
4. *Punjab National Bank v. Deogan Chand*, A. I. R. 1931 Lah. 302.
5. *Neilson v. James*, (1882) 9 Q. B. D. 546.
6. *Charles Salomon & Co., v. Esderi Aktiebolaget*, (1905) A. C. 305.

supposed, or is otherwise of a nature to materially influence the judgment of the principal in going on with the contract, they are bound to communicate that information to the principal and if they do not do so they are guilty of fraud and breach of duty and consequently liable for damages. The measure of damages is the difference between the amount which the vendee gave and the amount which the person making the subsequent offer would have given if the agent had done his duty.¹ So also, where an agent acting in collusion with a third party does an act without the consent of the principal, and the act is detrimental to the interests of the principal, the principal is not bound by such act and is entitled to recover the loss.²

Conversion
by agent.

Where an agent converts the goods of his principal, it has been held that, being a wrongful act, there is no fixed rule for determining the measure of damages, but must depend upon the circumstances of each case. In the case of conversion of goods of ordinary merchandise by the agent, the highest market value of the goods on any day between the date of conversion and the date of verdict is not always the proper measure. Where the plaintiff can re-purchase the goods after getting information of the wrongful sale, the market value of the goods on some subsequent day, should be the measure of damages, reasonable time being allowed to him for making the re-purchase.³ Where the goods are being conveyed from one place to another and there is a wrongful conversion by the agent, the market-value of the goods, at the place to which they were being conveyed at the time of conversion is the measure of damages, after deducting the cost of carriage from the place where the goods were converted to the place of destination.⁴

Agent not
liable for
remote loss.

As has been stated above,⁵ an agent is not liable for any remote consequences resulting from his negligence or wrongful act, but is only liable for the natural and immediate consequences. Illustration (a) to section 212,⁶ Indian Contract Act, allows only the direct loss which resulted from the agent's withholding of the money due to the principal, and expressly stated that the agent was not liable for any further consequences such as the loss resulting from the principal becoming an insolvent.⁷ So the agent is not liable for the loss of credit which the principal had suffered, or for any other loss resulting from the suspension of the business of the principal as a consequence of the agent's wrongful withholding of the money belonging to the principal.⁸

1 *Keppel v. Wheeler*, (1927) 1 K. B. 577 (C. A.). See *Abdul Rahiman v. Rangiah Gounder*, 22 I. O. 597, as to the duty of an agent in the converse case, where he was engaged for the sole purpose of procuring a sale of property for the principal.

2 *Ram Kaur v. Raghunath Singh*, 56 I. O. 631.

3 *Tadi Sarreddi v. Chelamcherlu Brahmiah*, A. I. R. 1928 Mad. 1152.

4 *Bombay Burmah Trading Corporation v. Mirza Mohammad*, I. L. R. 4 Cal. 116 at p. 120.

5. See notes on p. 346.

6 Cited at p. 336.

7. For comments upon this illustration, see C. K. Rao's 'The Law of Damages & Compensation,' P. 807.

8. Story on Agency, Arts. 220 and 221.

Illustration (d) to section 212,¹ presents another case where remote damages were not allowed. The principal was held disentitled to recover anything by way of loss of profits which he might have made by any subsequent rise in the price of cotton, as being merely a remote and speculative loss. In *Johnston v. Braham and Campbell*² which was an action by a principal against his agent for recovery of damages for the agent's misleading the principal into an unprofitable adventure which ended in loss, the Court disallowed those speculative profits which the principal might have made if he had his time or money at his disposal.³

Loss
profits.

In *Cossaboglou v. Gibb*⁴ a commission agent in Hong Kong was instructed to purchase opium of a certain quality, but opium of an inferior quality was purchased and shipped. Owing to the inferiority in quality the principal had to pay damages to a purchaser to whom he had sold it. Having sold away the opium for whatever it was worth, the principal filed a suit against the agent for recovery of damages calculated at the difference between the price for the inferior opium and the market value of the superior quality of opium. This would, of course, include the loss of profits sustained through a rise in the market price of the superior quality ordered. But the Court held that such damages are too remote and that the plaintiff could only recover the amount of damages which he had to pay to his purchaser, the expenses which he had incurred in the transaction and the money expended on his account in the purchase of the inferior opium.⁵ But in a case where the agent had, contrary to his principal's instructions, sold the stock on a day prior to the date fixed by the principal and the value of the stock had risen on the latter date, the measure of damages was held to be the difference in the value of the stock on the two dates.⁶ It will be observed that in all these cases the principle adhered to is that it is only the actual loss naturally and immediately resulting from the agent's negligence or breach of duty that is recoverable.

The measure of damages may, sometimes, vary according to the time at which the action is brought, and may also depend upon the facts and circumstances which have occurred subsequent to the arising of the cause of action, and the actual data placed before the Court at the time the action was brought. This principle was discussed in *Charles v. Altin*.⁷ Certain charterers had agreed to pay to the ship-owners one-third of the freight in advance on condition of its being returned, if the ship did not reach the port of destination, and also agreed to insure the amount of advance freight at the owner's expense. The charterers effected the insurance, but, as it was proved, ineffectually and worthlessly, and after deducting the amount paid as

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1. Cited at p. 336.

2. (1916) 2 K. B. 529.

3. See also *Charles Salvesen & Co., v. Rederi Aktieselskabet*, (1905) A. C. 302.

4. (1882) 11 Q. B. D. 797=52 L. J. Q. B. 538.

5. See also, *Malmearning v. Brandon*, (1818) 2 Moore, 125.

6. *Michael v. Hart & Co.*, (1902) 1 K.B. 482.

7. (1854) 15 O.B.46; 23 L.J.C. p.197.

premium, paid the balance of the one-third freight to the ship-owner. The ship failed in her voyage and the charterers sued for return of the advance freight. The ship-owners pleaded that since the charterers had been guilty of negligence in not properly effecting the insurance, they were entitled to a set-off for the amount of damages which they would be entitled to recover from the charterers. Incidentally, therefore, the question came to be considered as to what would represent the actual loss which the ship-owners were entitled to recover from the charterers for their negligence. The cause of action against the charterers in this case arose on the date on which they were guilty of negligence. Maule, J., said: "That which is complained of in the plea would give the defendants a right of action against the plaintiffs as soon as they were guilty of the negligence charged, and the defendant was thereby damnified. That which happened subsequently does not necessarily determine the amount of damages the defendant would be entitled to. A jury might have given exactly the same amount of damages before as after the loss. The question is, what damage has the party sustained at the time the cause of action vested in him? If nothing had happened and a policy might have been effected, the jury would consider what was possible; if the loss had then happened they perhaps might have given the full amount; but they were not bound to do so. There were a variety of circumstances which they might properly take into their consideration. As for instance, how far the duty to mitigate the damage has been fulfilled. "Therefore it is not a necessary and conclusive thing that the sum to be insured by the policy, neither more nor less, is the sum which the plaintiff would have to pay, but a compensation for the injury resulting from their negligence Perhaps after the loss, they would be bound not to give more than the amount of the actual loss, when no greater loss could happen." Therefore, according to the learned judge, since the action may be brought at any moment after the negligence was made, the measure of damages might be a continually varying amount depending upon the facts which have occurred up to the time action was brought.

57. Duty of the agent to communicate with the principal.

It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instruction.

(S. 214, *Indian Contract Act, 1872*).

It is the duty of agents to keep their principals informed of their doings, and to give them notice, within a reasonable time, of all such facts and circumstances as may be important to their interest, and if by neglect of the agent the principal suffers the loss, he is entitled to be indemnified by the agent.¹ In cases of extraordinary and difficult situations which sometimes arise in every business without any fault or neglect of the agent and which cannot be properly dealt with in the

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1. See Katar, p. 533, and the authorities cited therein.

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To seek instructions of the principal in cases of difficulty and to follow them

1 See Katiar, p. 533, and the authorities cited therein.

ordinary way and where there is still ample time to seek and obtain the advice of the principal without substantial loss to the business, it is the prime duty of a faithful agent to communicate with his principal and to obtain his instructions on such situations. But there may arise situations where it may be impossible to communicate with the principal to seek his instructions in time without loss to the principal or where such course would defeat the very object sought to be attained, the agent can, in the interests of the principal, dispense with the observation of this rule and can act on his own initiative.¹ In such a case if the agent, exercising reasonable prudence and sound discretion, in good faith, adopts a certain course which appears best to him under the circumstances then existing to safeguard the interests of the principal, he will be justified although subsequent events may demonstrate that some other course would have been better.² But where such extraordinary situation was brought about by the agent's own negligence or misconduct, he cannot escape liability to the principal for the loss resulting to him therefrom by adopting either course stated above even though that course was the only suitable course under the circumstances and may even be charged with further misconduct, if he fails to seek the instructions of the principal where it is possible to do so. An agent has, of course, authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.³ But while extraordinary circumstances may justify extraordinary powers it does not necessarily follow that the agent may assume any or all extraordinary powers, but the powers assumed should not exceed the exigencies of the occasion. They must be limited both in nature and extent by the necessities of the case and must bear as close a relationship to the authority already conferred as possible.⁴ This subject has already been dealt with in detail and may be referred to.⁵

If the agent disobeys the instructions obtained in time to meet such situation and acts on his own initiative, he is liable to the principal for any loss which may result to him therefrom in the same way and to the same extent as he would have been if these instructions had constituted part of his authority as original directions, and neglect of such instructions is a clear neglect of duty and the same rules govern the cases arising under this rule for the assessment of damages as have already been referred to above. If the instructions involve the doing of an illegal or immoral act,⁶ or a personal injury to the agent,⁷ he is, of course, not bound to obey them and no liability

1. An agent authorized to buy and sell at the best rates cannot defer carrying out the order till he can communicate the rate to the principal and obtain his instructions. *The firm of Visking Govardhondas & Co., v. The firm of Jorai Girdhari Lal*, 50 I. C. 146 (s).

2. *Ibid*; See also Katjar, p. 533 and the American authorities cited therein.

3. S. 189, Indian Contract Act, 1872.

4. See *Foster v. Smith*, 88 Am. Dec. 604.

5. See notes on pages 97 to 101, and 162 to 165.

6. *Brown v. Howard*, 14 Johns (N. Y.) 119; *Elmore v. Brooks*, 8 Heisk. (Tenn.) 45.

7. See *Matham*, 2 1261.

arises from such disobedience. Where the authority has been substantially preserved the agent is not liable for immaterial departure.¹ So also where the instructions are ambiguous and the agent acts in good faith in pursuance of such construction of them as appears to him reasonable and proper under the circumstances, he is not liable for any loss which might result to the principal, by such construction.² But because the instructions of an agent admit of different interpretation, he is not justified in disregarding them altogether and acting on his own initiative. If he acts at all in such a case he must follow one of the interpretations reasonably desirable from the uncertain terms of the instructions.³ The agent's liability to the principal for breach of his duty is not affected by the good faith of the agent and where a clear case of disobedience is made out against him he is liable even though he might have acted in good faith for the protection of the principal's interest.⁴ Even a volunteer acting gratuitously cannot escape liability for the breach of his duty, for, having entered upon the performance of the service, he must conform to the instructions of his master.⁵

58. Agent's duty to perform his undertaking.

Every agent who enters into an undertaking for valuable consideration is bound to perform the undertaking; but no agent is liable for the mere non-performance of that which he has undertaken to do gratuitously. Every agent must act in person, unless he is expressly or impliedly authorized by the principal to delegate his duties.⁶ As to when an agent can delegate his duties to others, reference may be made to notes on pages 292 to 303. In these cases also the measure of damages to which the principal is entitled is the actual loss sustained by the principal as a direct and immediate consequence of the breach of his duty.

FIDUCIARY DUTIES.

59. Agent's duty not to deal in the business of the agency on his own account.

If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Right of principal when agent deals on his own account in business of agency without principal's consent.

1. *Huntley v Mathias*, 90 N. C. 101; *Parker v Kett*, 1 Salk, 95. Where it is shown that the instructions have not been followed and that a loss has ensued the burden of proof that the departure was immaterial lies on the agent. *Wilson v. Wilson* 26 Pa. 399; *Walker v. Walker*, 5 Heisk (Tenn.) 425.
2. See *Kathar*, p. 535 and the American authorities cited therein.
3. *Oxford Lake Line Co. v First National Bank*, 49 Fla. 349; *Mecham*, 8. 1357.
4. *Laverty v. Snethen*, 23 Am. Rep. 184; *Scott v. Rogers*, 31 N. Y. 676.
5. *Kathar*, p. 535 and the authorities cited therein.
6. *Reynolds v. Reynolds*, 14 N. C. 90 and the authorities cited therein.

ILLUSTRATIONS.

- (a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.
- (b) A directs B to sell A's estate. B on looking over the estate before selling it, finds a mine in the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

(S. 215, *Indian Contract Act, 1872*).

An agent stands in a fiduciary relation towards his principal. He will not be permitted to enter into any transaction in which his personal interest conflicts with his duty to the principal, except with the consent of the latter given after all the material circumstances and the exact nature and extent of the interest of the agent have been fully disclosed to him.¹ A principal who entrusts his business to an agent and confides to him all his trade secrets, naturally expects that the agent will be loyal to him and to the business entrusted to him. The position of trust which is thus given to the agent gives him ample opportunity to profit by the taking of the undue advantage of it. In the business there are chances of gain as well as loss and the agent if he is allowed to act in breach of the confidence reposed in him, that he will utilize all the opportunities which offer themselves to him to the benefit of the principal, he can appropriate the chances of gain to himself and those of the loss to his principal. He can set up his own business in competition with that of the principal or when appointed to buy or sell, he can buy from or sell to the principal his own things representing them as belonging to third persons and make undue profit by his position of confidence by a fraudulent representation of greater or less price as suits his purpose or he can buy or sell things to himself and make similar profits by his fraud. Hence the rule laid down in section 215 of the Indian Contract Act, in order to guarantee the loyalty of the agent and to protect the principal from loss by a fraudulent breach of confidence which the principal has reposed in the agent. Even the mere possibility of the agent's duty to the principal and his interest being in conflict is itself a disadvantage to the principal and in matters touching the agency, an agent must never place himself in a position where it would be possible that his own interest might stand in opposition to his duty towards the principal.² A transaction which necessarily puts the agent's duty in conflict with the interest of his principal must be presumed to be disadvantageous to a principal who is not informed of the fact.³

Where there is a conflict between duty and interest, the servant or agent must disclose any understanding likely to

1. *Mathra v. Jivan*, 1928 Lah. 196=112 I.C. 29=9 Lah. 7.14.16

2. *Jankidas v. Dhunammal*, 37 I.C. 241. But see *Rameshwardas v. Tansookhras*, 1926 Sind 195, the section contemplates disadvantages in fact but not a mere possibility of being so.

3. *Rughnath v. Rampartap*, 1935 Sind 38.

result in gain to him, arrived at between the servant or agent and a third person who enters into a contract with the master or principal, otherwise such a secret bargain being fraud on the master or principal will entitle him to rescind the contract with such third person.¹

Principal's right to benefit gained by agent dealing on his own account in business of agency.

If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

ILLUSTRATION

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

(S. 216, *Indian Contract Act*, 1872).

This section, authorising the principal to claim the benefit of his transaction, if the agent deals on his own account, is merely enabling and confers upon the principal the right to claim from his agent the benefit of his transaction to which the agency business related, where the agent, without the knowledge of the principal, had deals with the business on his own account, instead of on account of the principal. The principal is free to secure that right or not.²

The English law on the subject is thus stated by Bowstead:³ "No agent is permitted to enter, as such, into any transaction in which he has a personal interest in conflict with his duty to his principal, unless the principal, with a full knowledge of all the material circumstances, and of the exact nature and extent of the agent's interest, consents. Where any transaction is entered into in violation of this rule, the principal, when the circumstances come to his knowledge, may repudiate the transaction, or may affirm it and recover from the agent any profit made by him in respect thereof."

Thus the English law does not recognise the qualifications added at the end of section 215 of the Indian Contract Act, ⁴ and it does not appear why it was thought necessary to add them. The English doctrine may be thought to have been affected by the well-known severity of Courts of Equity towards trustees, and to be in excess of a reasonable standard of ordinary commercial justice. In fact, the special provisions of the Trusts Act, Ss. 51-54, are more stringent. However in *Achutha Naidu v. Oakley, Bowden & Co.*,⁵ where an agent dealt on his own account in the business of the agency and bought the goods of his principals in the name of a dummy, it was held

1. *Boulton Bros. v. New Victoria Mills*, 1929 All. 87=119 L. C. 837.

2. See *Katkar*, p. 539 and the authorities cited therein. See also *Joachimson v. Meghjee Vallabhdas*; 34 Bom. 292.

3. Article 50, p. 102.

4. See *Ex parte Lacey* (1802) 6 Ves. 625=6 B. R. 9, 11.

5. (1922) 46 Mad. 1005=69 L. C. 927.

that the fraudulent concealment of his identity and the fact that he was competing in the same market brought the case within section 215 of the Indian Contract Act.¹

Under the English Law lapse of time is no bar to the action, so long as the principal remains, without any fault on his part, in ignorance of the fraud.² A stockbroker was employed to purchase certain shares. He purchased the shares from his own trustee without informing the principal of the fact. The transaction was set aside, after an interval of many years, without inquiry whether a fair price was charged or not.³

Again, where a director of a company enters into a contract on behalf of the company with a firm of which he is a member, the contract is voidable in equity by the company, quite apart from the question of its fairness or unfairness.⁴ It is the duty of a director to promote the interests of the company, and he will not be permitted to enter into engagements in which his own interest is in conflict with that duty. But, in the absence of fraud, he is not bound to disclose to the company breaches of his obligation arising out of the relationship so as to give the company the opportunity of dismissing him.⁵

In *Tyrrell v. Bank of London*,⁶ a solicitor entered into an agreement under which he was to receive a share of certain property, and also a share of the profit arising from the sale of such property. He subsequently acted as solicitor in purchasing a large portion of the property, without disclosing his interest therein to the client for whom he so acted. Held, that he was a trustee for the client of a proportionate part of the share taken by him, and that he must account for the full amount of the profit made by him upon the sale, with interest at the rate of 5 per cent.

An auctioneer, who was employed to sell an estate, purchased it himself. The transaction was set aside, after an interval of thirteen years.⁷

An agent authorised to insure should not insure policies to himself and an agent authorised to purchase or hire should not purchase or hire of himself. Similarly, an agent authorised to sell, exchange or lease should not sell exchange or lease to himself.⁸

It has also been held under the English Law that no agent for the property is permitted to purchase it himself, and no

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1. See Pollock & Mulla, p. 578.

2. *Oelkers v. Ellis*, (1914) 2 K. B. 139=83 L. J. K. B. 658. But a principal who seeks to set aside a transaction on the ground that the provisions of the section have been violated must take proceeding for that purpose within a reasonable time after becoming aware of the circumstances relied on—*Wentworth v. Lloyd*, (1864) 10 H. L. Cas. 599=188 R. R. 315.

3. *Gillett v. Peppercorne*, (1840), 3 Beav. 78; *King v. Howell*, (1910) 27 T. L. R. 114, Q. A.; *Armstrong v. Jackson*, (1917), 2 K. B. 822.

4. *Aberdeen Ry. v. Blakie*, (1854), 2 Eq. R. 1281, H. L. See also *Transvaal Land Co., New Belgium etc., Co.*, (1914), 2 Ch. 488; *Re Thomson*, (1920), 1 Ch. 203.

5. *Bell v. Lever Brothers, Ltd.* (1932), A. C. 161.

6. (1862) 10 H. L. Cas. 26=31 L. J. Ch. 369.

7. *Oliver v. Court*, (1920), Dan. 301.

8. See Kistner, p. 540, and the American authorities cited therein.

agent to purchase is permitted to buy his own property on the principal's behalf unless he makes full disclosure to the principal and the fact he pays or charges a fair price is immaterial.¹ So, an agent of a trustee for sale or of a mortgagee selling under his power of sale, who is employed as agent in the matter of the sale,² cannot purchase the property sold;³ and a solicitor who conducts a sale of property, must not purchase it without a full explanation to the vendor.⁴

On the principle that an agent must never place himself in a position in which it is possible that his duty to his principal and his own interests would stand in opposition to each other, it has been held that an agent employed to settle a debt cannot purchase it upon his own account.⁵ An agent who has agreed to purchase goods on behalf of his principal is not entitled to sell his own goods to his principal "without the knowledge and consent of the principal".⁶ Where the plaintiff company acted as the agents of the defendant company and supplied the latter at reasonable retail prices goods which they themselves had bought wholesale at lower prices, *held* that the plaintiff company were not entitled to make any profit on the goods supplied to their principal.⁷

If the agent employed to buy goods sells his own goods to the principal at a rate higher than the market price, the latter may repudiate the transaction though he ratified it without the knowledge of the above facts.⁸ Where, however, an agent employed to sell becomes himself the purchaser he must show that this was with the knowledge and consent of his employer, or that the price was the full value of the property so purchased; and this must be shown with the utmost clearness and beyond all reasonable doubt.⁹ But a purchase or sale made by the commission agent of his own goods for or to his principal without disclosing that fact is not *ipso facto* void for failure to disclose a material fact. A contract for future delivery if made by agent on his own behalf is not *ipso facto* void because there is a possibility of its being disadvantageous to the principal if the agent is entrusted with to carry it out.¹⁰ So, where, an agent appointed to sell the principal's goods for a fixed price buys them on his own account without the previous consent of the latter, it is competent for the principal either to repudiate the transaction under the circumstances mentioned in S.215 or to affirm it.¹¹

An agent for sale or purchase must not act for the other party at the same time, or take a commission from him un-

1. *Lowther v. Lowther* (1806), 13 Ves. 95, 102.

2. See *Nutt v. Enaton*, (1900), 1 Ch. 29.

3. *Whitcomb v. Minchin*, (1820), 5 Madd. 91.

4. *Re Bloye's Trust* (1849), 19 L. J. Ch. 89.

5. *Damodar v. Sheoram*, 29 All. 730, 734.

6. *Holmes Wilson & Co., v. Bata Kishore*, 54 Cal. 549=1927 Cal. 668=104 I. C. 268.

7. *Twinnas Oil Co., v. Muncer Co.*, 26 I. C. 478 (Bur).

8. *Damodar v. Sheoram*, 29 All. 730.

9. *Charter v. Trevelyan*, 11 Cl. & F. 714, 732, followed in *Holmes Wilson & Co., v. Bata Kishore*, 1927 Cal. 668.

10. *Firm of Rameshardas v. Tansookhras*, 1927 Sind 195=102 I. C. 366.

11. *N. Joachimson v. Meghjee Vallabhdass*, 34 Bom. 292.

known to the principal,¹ or settle any claim of his against the principal on exorbitant terms thereby to increase his own profit.² An agent must give his principal "the free and unbiased use of his own discretion and judgment".³

Where an agent acts in breach of this duty, the transaction is liable to be avoided by the principal or to be adopted by him with a claim of all the benefits the agent has derived therefrom irrespective of the fact whether it was fair or unfair.⁴ Where an agent is employed to purchase or sell property and he sells his own property to the principal or himself purchases the property of the principal, without obtaining his consent thereto after a full disclosure of the facts that may have come to his knowledge and which are material for his consideration while giving such consent, the transaction is voidable at the option of principal in spite of the fact that the agent paid or charged a fair price for such purchase or sale.⁵ The fact that the principal had priced a price at which he was willing to sell and that the agent buys at that price is also immaterial inasmuch as that the agent may be knowing that more can be obtained, which knowledge he was bound to utilise for the benefit of⁶ the principal and not for his own benefit. An auctioneer, however, is not deemed to be an agent of the purchaser and he may properly sell his own property without disclosing that he is the owner thereof.⁷ Although fairness of the transaction is no defence available to the agent, unfairness of it may be pleaded by the principal in support of his claim and may be sufficient to set aside the transaction even where the principal fails to show a dishonest concealment of material facts by the agent. Where a transaction has been entered into, by the agent on his own behalf without the principal's consent, the principal in order to repudiate it may rely on the sole fact that the transaction is disadvantageous to him and need not prove the dishonesty of the agent.⁸

Fairness or unfairness of the transaction how far material.

Where an agent arranging a loan for the principal lends his own money representing that the loan was from a third person and a mortgage is executed on terms settled by the agent, the transaction is voidable at the option of the principal and equity will avoid it in all cases where the parties can be remitted to their former position.⁹

Agent lending own money.

1. *Grant v. Gold Exploration, etc., Syndicate of British Columbia* (1909) 1 Q. B. 233, is a later example.
2. *Mathra Das Jagan Nath v. Jivan Mal Ghan Chand*, 1928 Lah. 196 (the plaintiffs were in a ring, including some of the buyers, for artificial inflation of prices).
3. *Clarke v. Tipping* (1848) Beav. 284, at p. 292 73 R. R. 355, at p. 361.
4. *Gillet v. Peppercorne*, 3 Beav. 78; *Armstrong v. Jackson*, (1919) 2 K. B. 822; *Abderdeen Rail Co. v. Blakie*, 2 Eq. R. 1281; *Transvaal Land Co. v. New Belgium etc. Co.*, (1914) 2 Ch. 488.
5. *Ibid*; See also *Bentley v. Cranen*, 18 Beav. 75; *Nutt v. Easton*, (1900) 1 Ch. D. 29; *Martinson v. Clowes*, 21 Ch. D. 857.
6. See *Katlar* p. 544 and the authorities cited therein.
7. *Flint v. Woodin*, 9 Hare, 618.
8. See *Katlar*, p. 544 and the American authorities cited therein.
9. *Blaweswar v. Gurn*, 1928 Cal. 727=112 I. C. 369.

Brokers.

It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper.¹

A broker is employed to sell goods. He sells them, ostensibly to A, really to A and himself jointly. While the goods are still in the possession of the broker, he becomes bankrupt, A also being insolvent. The principal may repudiate the contract and recover the goods specifically from the trustee in bankruptcy of the broker.² In *Wilson v. Short*,³ a firm of brokers were authorised to purchase goods. They delivered bought notes to the principal, which purported to be notes of a contract of which the brokers guaranteed performance, but which did not disclose the sellers. The principal paid the brokers their commission and a deposit, and subsequently discovered that one of the brokers intended to perform the contract himself. The principal was held to be entitled to repudiate the contract, and the brokers were ordered to repay the deposit and commission with interest. No agent can become a principal and deal on that footing without full and fair disclosure.⁴

No approbating and reprobating.

The law is that where a party elects to adopt a transaction he must take its benefits with its burden. He cannot, as is said "both approbate and reprobate". Both the benefit and the burden must, for that purpose, be attached to as incidents of the transaction which the principal has affirmed by election.

In the case of a purchase of the principal's goods by the agent on his own account if the principal elects to affirm the transaction, he will be liable to pay to his agent such charges only as are incidents of the transaction of purchase, that is, such as the vendor under the contract would have been liable to pay to the purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them.⁵

Principal's rights to profits.

It may be laid down as a general principle that in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the

1. *Willes J. in Mallett v. Robinson*, (1870) L.R. 5 C.P.646, at p.655. Local usage of a trade or market contravening the general rule is not binding on a principal not proved to have known it.
2. *EX. P. Huth, re Pemberton*, (1840), 4 Dea.294.
3. (1847), 17 L.J.Ch.289.
4. *Ibid.* see also *Williamson v. Barbour*, (1877), 9 Ch.D.529.
5. *N. Joachimson v. Meghjee Vallabhdas*, 34 Bom.292.

benefit of his employers.¹ If they are the fruit of the agency they must go to the principal and it matters little whether they are obtained by the performance of the duties of the agent or by their violation. If they are the result of the strict performance of a duty they accrue to the principal as the legitimate consequence of the relation; and if they arise from the violation of a duty, they likewise must go to the principal, not only because he assumes responsibility of the transaction but also because the agent cannot be permitted to derive advantage from his own default. It is only by rigid adherence to this rule that all temptation can be removed from one, acting in a fiduciary capacity, to abuse his trust and seek his own advantage in the position which it affords him.² If a person, while holding a fiduciary position and acting in that capacity, makes a profit without fully disclosing his interest to those persons towards whom he stands in such a position, he must account to them for that profit;³ and it is immaterial that in acquiring the profit the agent may have run the risk of loss⁴ and contributed his own funds or responsibility in producing the result and that the principal may have suffered no injury.⁵ Accordingly, if an agent for sale receives a share of commission or extra profit from the buyer's agent without the knowledge of his own principal, the principal can recover the sum of money received to his use.⁶

The general rule thus is that a person who is dealing with another man's money ought to give the truest account of what he has done, and ought not to receive anything in the nature of a present or allowance without the full knowledge of the principal that he is so receiving.⁷ An agent cannot, without the knowledge and consent of the principal, be allowed to make any profit out of the matter of the agency beyond his proper remuneration as agent. He would be answerable for any present solicited out of the money paid on behalf of his principal, because it is perfectly obvious that if the creditor who received the payment is willing to make a deduction and discount from the sum he had received that must be for the benefit of the master who is making the payment and not for the benefit of the servant,

1. *Story on Agency*, § 211, adopted by the Court of Queen's Bench in *Morton v. Thompson*, (1874), L. R. 9 Q. B. 480 at p. 485. There are limits to constructive agency. A is a mortgagee in possession holding from Z, the mortgagor, a power of attorney to manage and sell the property. M, a subsequent mortgagee with whom A has nothing to do, exercises his power of sale. A is not Z's agent for the purpose of that sale and is entitled to become the buyer without being liable to account to Z: *Official Assignee v. R. M. P. V. M. Firm*, 1929, Rang. 140=118 I. C. 825. But the connection of mortgagees' peculiar rights and duties with the general law of contracting parties is at best remote. See Pollock & Mulla p. 579.

2. *Pricker v. McKenna*, L. R. 10 Ch. 96, See Kitari, pp. 549, 550.

3. *Starling, L. J., Costa Rica R. Co., v. Forwood*, (1901) 1 Ch. 746. In that particular case the plaintiff company was held to have no right to complain of one of its directors having made profit out of a contract with the company, partly because of a special provision in the articles of association and partly because the company was in substance informed of all the material facts.

4. *Williams v. Stevens* (1866) L. R. 1 P. C. 352.

5. *Parker v. McKenna* (1874) L. R. 10 Ch. 96, *Kalusam v. Chinnuram*, 1934 Bom. 86=150 I. C. 467.

6. *Ibid*; See also note (2) above; *Manikka Mooppanar v. Peta Muniyandi*, 1936 Mad. 541=146 I. C. 31.

7. *Turnbull v. Garden* 38 L. J. Ch. 331 ref. to in *Mayer v. Alston*, 16 Mad. 238.

who without consent of his master has no right to receive any such profit.¹ As Lord Cockburn stated the result of the authorities in *Morrison v. Thompson*:² "An agent is bound to account to his principal for all profits made by him in the course of his employment, and is compelled to account in equity. At the same time there is a duty which we consider a legal duty, incumbent upon him, whenever any profits so made have reached his hands, to pay over the amount as money absolutely belonging to his employer, unless there is an account remaining to be taken between him and his employer".

Thus all profits and every advantage beyond lawful compensation, made by the agent in the business, or by dealing or speculation with the effects of his principal, though in violation of his duty as agent, and though the loss, if one had occurred, would have fallen on the agent, will, wherever they can be regarded as the fruit or the outgrowth of the agency, be deemed to have been acquired for the benefit of the principal.³ Even though a transaction was outside the actual purview of the agency, yet if the agent at the time he entered into the transaction was professing to act for the principal and in his behalf, the benefit of the transaction will inure to the principal.⁴ It matters not how fair the conduct of the agent may have been in the particular case, nor that the principal would have been no better off if the agent had strictly pursued his authority, nor that the principal was not in fact injured by the intervention of the agent for his own benefit.⁵ In all such cases the principal may, at his option, compel the agent to account for or convey to him the profits thus acquired.⁶

So, where an agent while pretending to act as the agent of the purchaser of certain real estate, was in reality acting as the agent of the seller, and received as his compensation from the seller a pro-note given by the purchaser as part of the purchase price, it was held that he should be restrained from enforcing payment of the note and that it should be delivered up and cancelled.⁷ Where an agent, authorised to sell land or other property at a given price, succeeds in realising more than that price for it, the excess belongs to the principal.⁸ So also, where an agent authorised to purchase at a given price, or authorised to settle a claim at a given sum succeeds in effecting a reduction in such price or in such sum, the amount saved belongs to the principal. So, where an agent, authorised to deal upon the best terms he can get, reports less favourable terms than those actually secured and keeps the difference, he is liable to account to the

1 Hay's case, L R 10 Ch 593, 601 ref to in *Hari Vallabhdas v Bhas Jwari*, 26 Bom 689

2 L R 9 Q B 480, referred to in *Mayer v Alston*, 16 Mad 238, 249

3 See Katial, p 550 and the American authorities cited therein

4 *Salisbury v Ware*, 183 Ill. 505, *Dennis v McCogg*, 32 Ill. 439; *Watson v. Union Iron & Steel Co*, 15 Ill. App 509.

5 *Mechem* § 1225, *Parker v McKenna*, L R 10 Ch 96, *Turkwa Main Reef v. Merton*, 19 T L R 367

6 *Greenfield Savings Bank v Simons*, 133 Mass 415

7 *Mosnett v Days* 1 Baxt (Tenn.) 431

8 *Merryman v David*, 31 Ill 404

principal for the amount thus realised.¹ So, where an agent authorised to sell buys at the minimum price himself, the principal can either avoid the transaction or can affirm it and in the latter case he can claim the difference between the price already paid and the price which would have been obtained by him but for such purchase by the agent himself.²

The principal is entitled to all the profit made by the agent except his legitimate remuneration which he is entitled to get from the principal himself, and they include all the sums realised by the agent by way of commissions, rebates, rewards, overcharges, or bribery.³ So, where a purchasing agent secures from those with whom his principal dealt commissions for buying goods from them, the principal is entitled to recover from the agent the amount of the commissions thus received.⁴ So also the agents for the purchase of land or goods or the letting of contracts, and the like, who have arranged with the sellers or bidders to increase the expected price and to pay to or divide the increase with them, may be compelled to account to the principal for the sums so received.⁵

Where an agent has undertaken to devote his entire time and energies to the principal's business, he cannot use the time belonging to the principal in performing services of third persons and if he does so the principal can claim damages for any injury thereby caused to his business, or instead thereof the amount thus earned by the agent and in the latter case can compel the agent to account to him for such earnings.⁶ So also if an agent set up a business of his own in competition with that of the principal and thus divert to himself the profits which might otherwise have accrued to the principal, the principal may lawfully discharge him⁷ and may compel him to account for the profits thus made.⁸ This right of the principal, however does not belong to the principal⁹ provided the work done therefor does not compete with or injure the principal's business.¹⁰ As regards the sums and property which the agent gets from third person by way of commission, rebate, reward, overcharge or bribery, he can only be compelled to account for them to the principal and cannot be treated as a trustee for the principal, while as regards the sums and property which he receives from the principal through collusion with the third persons dealing with the principal, the principal can charge him as trustee and can follow such money or property as the trust funds or trust property.¹¹

1. See *Mecham*, 8. 1226; *Melden & Melrose, Gau L. Co, v Chandler*, 211 Mass. 226.

2. *Greenland Savings Bank v Simons*, 133 Mass 415

3. See *Katlar*, p. 552, and the authorities cited therein.

4. *Ibid*.

5. *United States v. Carter*, 217 U. S. 256; *Hogle v. Meyering*, 161 Mich. 472.

6. See *Katlar*, p. 553 and the American authorities cited therein.

7. *Adams Express Co. v. Trego*, 35 Md 47.

8. *Transvaal Gold Storage Co. v. Palmer*, (1904) Transv. L. B. S. C. 3; *Nitedals Tøndealkfabrik v. Buster*, (1906) 2 Ch. 671; *Reis v. Volck*, 151 N. Y. App. Div. 613.

9. *Geiger v. Harris*, 19 Mich. 209.

10. *Hillsboro National Bank v. Hyde*, 7 N. D. 400; *Katlar*, p. 553.

11. *Katlar*, pp. 553 & 554.

A, acting as B's agent, agrees with C for the sale to him of fifty maunds of grain for future delivery. A delivers his own grain to C as against the contract. Subsequently he receives grain from B for delivery to C under the contract, which he sells in the market at a profit. B may on discovering these facts, claim the profit from A.¹

Where an agent has in effect bought from his principal, a subsequent purchaser from the agent with knowledge of the agency is in no better position against the principal than the agent himself.²

Secret profits made by agent.

It is thus a recognized principle of law that an agent is not entitled to make a secret profit by dealing in the agency on his own account, and if any profit accrues he must account for it. An agent must never place himself in a position in which it is possible that his own duty to his principal and his own interests would stand in opposition to each other. Story observes³ -- "It may also be stated as generally true that all profits which are made by the agent in the course of the business of the principal belong to the latter. Indeed, this doctrine is so firmly established upon principles of public policy that no agent will be permitted to take beyond a reasonable compensation for his services any profit incidentally obtained in the execution of his duty, even if sanctioned by usage. Such a usage has been severely stigmatized as usage of fraud and plunder. When the profits are made by a violation of duty it would be obviously unjust to allow the agent to reap the fruits of his own misconduct, and when the profits are made in the ordinary course of the business of the agency, it must be presumed that the parties intended that the principal should have the benefit thereof."⁴

Where an agent uses a debt due to his principal in order to obtain valuable property himself, he in fact realises that debt for and on behalf of his principal and is liable to account for the same. It is of no consequence that a third person has been joined as vendee in the sale transaction.⁵

Where the plaintiff who agreed to send the defendant's goods to a foreign country for commission arranged to receive a return commission from the foreign merchant without the defendant's knowledge, *held*, that the defendants were entitled to the return commission.⁶

An agreement between a broker and a clerk under which the latter would get a commission on brokerage caused as a result of the clerk's inducing his master to deal with the broker, the master having no knowledge of the agreement, cannot be enforced.⁷

1. *Damodar Das v. Sheorandas* (1907) 29 All. 730.

2. *Molony v. Kernan* (1842) 2 Dr. & W. 31=59 R. R. 635.

3. Story on Agency, para 207.

4. Quoted in *Damodar Das v. Sheoram Das*, 29 All. 730, 734; also *Sirdar Heers Singh v. Sirdar Jowahir Singh*, 19 P. R. 1867.

5. *Birbal v. Kishorilal*, 12 A. L. J. 463.

6. *Mayen v. Alston*, 16 Mad. 238.

7. *Vinayakarao v. Ramsardas*, 7 B. H. C. O. C. 90.

A creditor satisfying his debtor's other creditors with lesser amounts cannot claim the remissions.¹

Where an agent sells his own goods to the principal without disclosing the same, the principal is entitled to claim any benefit from the agent resulting from such transaction even if the goods were acquired before the date of agency, but the measure of profit is the difference between the price at which the goods are given to the principal and the market value and not the difference between the price at which the agent bought and the price at which he sold to the principal.²

An agent who while secretly negotiating a sale of the principal's land or other property to third persons for a large sum by concealment of the facts as to the value and demand of the property obtains from his principal a conveyance of it to himself for less than it is worth and then conveys it to third persons, will be held to account to his principal for the excess so received.³

It has been held that in law as well in equity an agent for the sale of goods belonging to the principal cannot, while actually selling the property or making settlement for damages on foot of such transactions, make any secret profit for himself or for persons with whom he is associated.⁴ Where a person contracted with another to pay him a certain amount in case he successfully assisted him to recover a property and the latter secured the assistance of the managing clerk of a firm of solicitors in charge of the former's suit on condition of paying him half of that amount, *held*, that the managing clerk attempted to acquire a benefit from the former who had no knowledge originally of the agreement and never acquiesced in it, and so he could not recover anything under the agreement though the suit was not against the client.⁵

The principal can also recover from the agent and from the person who bribed him under the name of commission or otherwise, jointly and severally, damages for any loss sustained by the principal by reason of entering into the contract, *e. g.*, an addition fraudulently made to the price of goods bought through the agent* in order to give the agent a secret profit. Recovery of the illicit profit from the agent is no bar to action for further damages against the third person.⁶ The relation which arises in such cases between the agent in default and the principal is that of debtor and creditor, not of trustee and beneficiary.⁷ The ordinary law of limitation is applicable, the time running from the principal's discovery of the facts,⁸ and the special rules as to following trust money into its investments do

1. *Venkatarayadu v. Ramakrishnayya*, 1937 Mad. 810.

2. *Kaluram v. Chinnirani*, 1934 Bom. 86=150 I. C. 467.

3. *Stoner v. Welsar*, 24 Iowa. 434.

4. *Mathra Das v. Jivan*, 1928 Lah. 196=112 I. C. 29.

5. *Hartvallabhdass v. Bhai Jivanji*, 26 Bom. 689.

6. *Mayor of Salford v. Lees*, (1891) 1 Q. B. 168. C. A.

7. *Lister & Co., v. Stubbs*, (1890) 45 Ch. D. 1; *Powell, v. Jones*, (1905) 1 K. B. 11.

8. *Metropolitan Bank v. Heiron* (1880) 5 Ex. Div. 819.

not apply.¹ Interest is recoverable on bribes and on all secret profits received by the agent.²

Profits not
acquired in
course of
agency.

The Court of Appeal in *In re Cape Breton Co.*,³ held that an agent who, without disclosure, sells to his principal goods which were the property of the agent before the commencement of the agency is not, in the absence of misrepresentation,⁴ liable to account for the profit made by him or for the difference between the contract price and the market value, even if the remedy of rescission is not open to the principal owing to its having become impossible.⁵ This decision, though obviously open to criticism, has been approved by the privy Council in a *Canadian* appeal where a director of a company purchased property on his own account, and subsequently sold it to the company at a higher price without disclosing the profit. The Bombay High Court has held that, whether *In re Cape Breton Co.*, was originally decided or not, "it cannot be said to have laid down a principle so generally accepted that we must assume it to have been present to the minds of those who framed the Contract Act in 1872, and what we have to do is to construe the Contract Act. The words of S.216 are quite general and contain no such qualification on the liability of an agent to account for a profit made by the sale of his own goods to the principal as was approved in *In re Cape Breton Co.*".⁶

Forfeiture of
commission.

An agent who has wrongfully dealt on his own account is obviously not entitled to recover any commission for the transaction, even if the principal adopts it, for the principal could forthwith recover it back from him under section 216 of the Contract Act or the equivalent common law rule. Moreover, he had no authority to make a contract with himself and therefore has earned nothing as agent.⁷

The principal's option of ratifying the unauthorized transaction does not give the agent any better right.⁸

Knowledge
of principal.

A transaction of this kind may be approved or ratified by the principal,⁹ but it must be upon full disclosure. It is not enough for the agent to tell the principal that he has some interest of his own. He must disclose all material facts, and be prepared to show that full information was given and the agreement made with perfect good faith. Notice sufficient to put the principal on inquiry will not do.¹⁰ Thus, where an

1. *Lister & Co., v. Stubbs* (1890) 45 Ch. D. 1.
2. *Nant-y-glo Iron Co., v. Grave* (1878) 12 Ch. D. 738; *Pearson's case* (1877) 5 Ch. D. 336; *Tota Ram v. Zahn Singh*, A. I. R. 1940 All. 69=187 I. C. 277.
3. (1884) 29 Ch. D. 795. And see *Ludswell Mining Co., v. Brookes* (1887) 35 Ch. D. 400.
4. As to misrepresentation, see *In re Leeds, etc., Theatre of Varieties* (1901) 2 Ch. 303.
5. *Burford v. Earle* (1902) A. C. 83.
6. *Katuram v. Chinnuram*, 1934 Bom. 86, per Beaumont C. J. at p. 86; see *Pollock & Mulla*, pp. 580,, 581.
7. *Salomons v. Pender*, (1865), 3 H. & C. 639; *Joachinson v. Meghjee Vallabhdas*, (1909) 34 Bom. 292.
8. See *Pollock & Mulla*, p. 580.
9. *Re Haslam* (1903) 1 Ch. 765.
10. *Jessal M.R., Dunne v. English*, (1874) L.R.19 Eq. 524, 533-536, citing and approving earlier authorities; *Gluckstein v. Barnes* (1900 A.C.240.

agent employed to buy goods sells his own goods to the principal at a price higher than the prevailing market rate, the principal is entitled to repudiate the transaction, and he is not bound by a ratification made in the absence of knowledge that the agent was selling his own goods and was charging him in excess of the market price.¹

Exception to the general rule.

It is open to the principal whose agent has bargained for a secret profit or commission to adopt the transaction, if he thinks fit, for the purpose of suing the third party and recovering for himself the sum, promised by him to the agent, or any part of it which the agent has not received.²

Thus all profits made by the agent with full knowledge and consent of the principal form exceptions to the general rule and are not affected by it.³ Where a principal knows that his agent will receive remuneration from third persons in the course of agency and acquiesces in his so doing although under a misapprehension as to the extent of the remuneration, such remuneration is not a benefit or profit acquired without the consent of the principal, unless the agent misinformed or intentionally misled him as to the extent thereof or knowing that he laboured under such a misapprehension, neglected to correct it.⁴ For instance, it is noted that it is usual with underwriters to allow insurance brokers, for punctual payment of premiums, ten per cent. cash discount or twelve per cent. calculated on the annual profits, in addition to the ordinary commission of five per cent. on such reinsurance. A company having made no enquiry as to the remuneration paid by the underwriters, and not being aware of the twelve per cent. allowance, employed an insurance agent to negotiate its business. After the agent who received no remuneration from the company had been paid the usual allowance of twelve per cent., for more than eight years, the company discovered it and claimed to have it paid over to them as secret profit. It was held that they were not entitled to recover.⁵ Every person who employs another as his agent with the knowledge that the agent receives remuneration from third persons and who does not choose to inquire what the charges of the agent will be must allow all the usual and customary charges of such an agent and is not entitled to dispute them because he was not aware of the extent of the remuneration usually received by such agents.⁶

As has already been observed, the case of a gratuitous agent or a volunteer is not excepted.⁷ The rule also does not apply to mere personal gratuities or gifts from third persons to the agent, which neither he nor the principal had any right to except, and which did and could offer no inducement to the agent to violate his duties, although they were made in

1. *Damodar Das v. Sheoramdas*, (1907), 29 All. 730.

2. *Whaley Bridge Printing Co. v. Green*, (1879) 5 Q. B. D. 109.

3. See Bowstead, Art. 55 p. 112; Mechem, §§. 1221 and 1230.

4. *Re Haslam*, (1902) 1 Ch. 765.

5. *Great Western Insurance Co. v. Cunliffe*, L. R. 9 Ch. 525; *Non regis v. Hodgson*, 13 T. L. R. 421 C. A.

6. *Ibid.*

7. See Katiar, p. 555 and the American authorities cited therein.

consideration of the benefits incidentally derived from the performance of the agent.¹ A commission merchant or sales agent may receive and attempt to sell the goods of many principals and the mere fact that he is made the exclusive agent or is given an "exclusive" territory, does not justify the inference that he is to give to any principal his entire time or efforts.² On the other hand a travelling agent would not usually be deemed justified in attempting to represent two or more houses in the same line or even carrying business in side lines. In the case of a commission merchant there is no contract for entire time and compensation while in the case of a travelling agent there is usually a contract of hiring for a definite period and the compensation is ordinarily a fixed salary.³ The rule does not apply where the principal has consented to, waived or condoned the act in respect of which the claim is laid by him.⁴ Where, while the whole matter still remains executory, he learns of the proposed act and does nothing to prevent it or even to object to it, he cannot afterwards recover damages for it.⁵ "To allow a person", observes Mitchell J. "who has discovered the fraud, while the contract is still wholly executory, to go and execute it and then sue for the fraud, looks very much like permitting him to speculate upon the fraud of the other party. It is fraudulent to allow a man to recover for self-inflicted injuries."⁶

Custom or usage to the contrary.

Any custom or usage to the contrary permitting the agent to act in breach of the duty specified above or depriving the principal of the benefit of this rule is void and unenforceable as being unreasonable and cannot defeat the rule.⁷ The rule that an agent who undertakes to act for his principal, may not, without the latter's consent, act in the business of agency, for himself cannot be avoided upon the authority of any local or temporary usage of which the principal was ignorant and which he had no reason to anticipate. For instance, a custom, whereby a broker authorised to sell certain shares and to pay himself certain advances out of the proceeds, may himself take over the shares at the price of the day in the event of his being unable to find a purchaser at an adequate price is unreasonable, and such a transaction is not binding on the principal unless he had notice of the custom at the time he gave the authority to the broker, even if it is proved that a forced sale of the shares would certainly have realised less than the price given by the broker.⁸ But where a stock exchange usage allowed a stocks-broker who purchased shares for a client and the client failing to carry out the contract had to re-sell them, to buy the shares himself after having a fair price fixed by a jobber, it was held that the price being fair and having been fixed at a reasonable time, the

1. *Aetna Ins. Co. v. Church*, 2 Ohio st. 492; *Polites v. Barlin*, 149 ky. 376, *Zappus v. Roumenote*, 137 N.W. 935.
2. *Hich Born v. Bradley*, 117 Iowa 130; *McGeehan v. Garr Scot Co.*, 122 Wis 630.
3. See *Eis v. Folck*, 136 N. Y. App. Div. 613.
4. See *Mechem*, §. 1239.
5. *Bartleson v. Vanderheff*, 96 Minn. 189; *Webb v. McDermott*, 5 Ont. W. R. 566.
6. Per Mitchell J. in *Thompson v. Libby*, 36 Minn. 287.
7. *Hamilton v. Young*, 7 L. R. Ir. 289; *Eothchild v. Brookman*, 2 D & C. 188; *De Busche v. Ah*, 8 Ch. D. 289; *Robinson v. Mallett*, L. R. 7 H. L. 802.
8. *Butcher v. Kvanth*, 14 Bush. (Ky.) 713.

sale was binding on the principal who must indemnify the stock-broker against the loss sustained by him,¹ subject of course, to the deduction of any profit which the stock-broker might have made by reason of the sale and re-purchase having been effected in one transaction;² and the fact that he purchased the shares himself on such re-sale was immaterial and did not render the usages unreasonable or inconsistent with his duties as agent.³ A custom, however, authorising an agent for sale to purchase at the minimum price if he cannot find a purchaser is unreasonable,⁴ and so is every custom or usage which converts the agent into a principal or otherwise gives him an interest at variance with his duty.⁵ None of such customs or usages binds the principal unless he can be charged into an actual or constructive notice thereof at the time when he gave the authority.⁶

An agent is liable to refund to the principal the amount of "return commission" received by him from his sub-agent.⁷

Unauthorized
profits of
agents.

Payments
authorized
by custom.

The law contained in section 216 of the Indian Contract Act does not interfere with the customary mode of remunerating an agent in certain branches of business by a discount or percentage which is ultimately paid by the third party, and not by his own principal. Here the agent's position is almost that of an officer of a market paid by a toll on the goods dealt with. Such allowances are constant in brokerage and insurance business and are so well known that no special consent on the principal's part is needed to cover them. They are included in the agent's general authority to do business in the usual manner. If a person employs another, who he knows carries on a large business, to do certain work for him, as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the other persons—which is very common in mercantile business—and does not choose to ask him what his charge will be, he must allow the ordinary amount which agents are in the habit of charging.⁸ These charges being allowed on a fixed scale to all persons employed in that kind of business alike, and, notorious, are not obnoxious to the rule against secret profits and corrupt allowances.⁹

1. *Macoun v. Erskine* (1901) 2 K. B. 493; *Walter v. King*, 13 T. L. R. 270 C. A.; *Re Finley*, (1913) 1 Ch. 564.
2. *Erskin v. Sachs* (1901) 2 K. B. 504.
3. See *Bowstead*, Art. 71, p. 166, Ill. 13.
4. *De Busche v. Alt.*, 8 Ch. D. 286.
5. *Robinson v. Mollett*, L. R. 7 H. L. 802.
6. See *Katlar*, p. 549 and the American authorities cited therein.
7. *Mayen v. Alston*, (1892) 16 Mad. 238, 265, 267, Cp. *Rossiter v. Walsh* (1843) 4 Dr. & W. 485—85 R.R. 745, a peculiar case of an important lease by an agent to a sub-agent of the same principals, where, the agent not being in fact empowered by all the principals, Sir E. Sugden saw his way to set the lease aside—See *Pollock v. Mulla*, p. 581.
8. *Great Western Insurance Co. v. Cunliffe* (1874) L.R. 9 Ch. 325 540; *Baring v. Stanton* (1876) 3 Ch. D. 502.
9. See *Pollock & Mulla*, p. 581.

It has been held under the English law that special customs inconsistent with the general law referred to above are unreasonable. A broker is authorised to sell certain shares, and pay himself certain advances out of the proceeds. A custom whereby he may himself take over the shares at the price of the day in the event of his being unable to find a purchaser at an adequate price is unreasonable, and such a transaction is not binding on the principal unless he had notice of the custom at the time when he gave the broker the authority even if it is proved that a forced sale of the shares would certainly have realized less than the price given by the broker.³ So, a custom whereby an agent for sale may purchase at the minimum price if he cannot find a purchaser is unreasonable.¹ Every custom or usage which converts an agent into a principal, or otherwise gives him an interest at variance with his duty, is unreasonable, and no such custom or usage is binding on any principal who has not notice thereof.²

Where, however, a stock-exchange usage allowed a stock-broker who purchased shares for a client and the client failing to carry out the contract, had to re-sell them to buy the shares himself, after having a fair price fixed by a jobber, it was held that the price being fair and having been fixed at a reasonable time, the sale was binding on the principal who must indemnify the stockbroker against the loss sustained by him, subject of course, to the deduction of any profit which the stock-broker might have made by reason of the sale and re-purchase having been effected in one transaction,⁴ and the fact that he purchased the shares himself on such re-sale was immaterial and did not render the usages unreasonable or inconsistent with his duties as agent.

Agreements
against the
agent's duty
are void.

An agreement between an agent and a third person which comes within the terms of section 216 of the Indian Contract Act, or in any way puts the agent's interest in conflict with his duty, is not enforceable unless the principal chooses to ratify it. Where a *mehta* (clerk), without the knowledge of his master, agreed with his master's brokers to receive a percentage, called *sucri*, on the brokerage earned by them in respect of transactions carried out through them by the *mehta's* master, and no express consideration was alleged or proved by the *mehta*, the Court refused to imply as a consideration an agreement by the *mehta* to induce his master to carry on business through those brokers, and was of opinion that such an agreement would be inconsistent with the relation of master and servant.

Westropp J. said: "To support such an agreement would be against the policy which should regulate the relation of master

1. *Hamilton v. Young* (1881), 7 L. R. Ir. 289; *Rothschild v. Brookman* (1881), 2 Dow. & Cl. 188—30 R. R. 147, H. L. See, however, Article 71, Illustration 13 cited at p. 169 of Bowstead's Law of Agency, 9th Edn.

2. *De Bussche v. Alt* (1877), 8 Ch. D. 286.

3. *Robinson v. Mollett* (1874), L. R. 7 H. L. 802.

4. *Macdon v. Erskine* (1901) 2 K. B. 498; *Walter v. King*, 13 T. L. R. 270, C. A.; *Re Finlay* (1918) 1 Ch. 564; *Christoforides v. Terry*, (1924) A. C. 566, cited as illustration 13 to Article 71 of Bowstead's Law of Agency, 9th Edn., p. 169.

5. *Erskine v. Sachs*, (1901) 2 K. B. 804.

and servant, and would be subversive of that relation, as such an arrangement would render it the interest of the servant to connive at conduct of the parties with whom his master deals which the servant ought to be vigilant to expose and to check .. . Could any one contend that the butler of a gentleman here or in London could maintain a suit against a tradesman for a percentage on his master's purchases, supposing an agreement to that effect. It would be against all policy; it would place the servant in a position inconsistent with the duty which he owes to his master".¹ So an agreement entered into by a *Patwari* for the purchase of land within his circle for his benefit is opposed to public policy as it creates an interest at variance with duty.²

An agreement whereby the defendant agreed to remunerate an executor appointed under her brother's will out of her own pocket for undertaking the duties of executor, which he declined to do without remuneration, does not create such an interest at variance with the duties imposed upon executors as to render the agreement illegal on the ground of public policy.³ The Court said: "It has, however, been strongly contended before us that the present contract is against public policy, because it creates an interest at variance with a duty (see *Egerton v. Earl Brownlow*, 4 H L C 1, 250); that is to say, if the plaintiff be remunerated for his services there will be an inducement for him to neglect his duties and to prolong the administration instead of acting with the care and diligence. We think that there is much force in this contention, but at the same time, although an agreement of this character may appear to some extent for the above reason to be opposed to public policy we are not prepared to hold that such an agreement is necessarily unlawful. We think it should be borne in mind that if a sole executor, or where there is more than one all the executors, renounced, the estate of the testator might go unadministered unless the executor or executors undertook to accept office on receipt of remuneration from a third person, and it is quite possible that more public mischief and inconvenience might be occasioned by the estate remaining unadministered than by rewarding an executor for administering it. In the present case it seems to be quite clear upon the evidence that Shajani Kanta would not have taken upon himself the duty of executor unless he was remunerated, and we are not prepared to say that under the circumstances the agreement entered into between him and the Maharani was unlawful".⁴

In order to further safeguard the principal's interest and to prevent the agent from taking undue advantage of his position of trust and confidence, the law provides that where an agent enters into any contract or transaction with his principal or with his representative in interest he must act with the most perfect good faith, and make full and fair disclosures of all the material circumstances, and of everything known to him

Agents dealing with the principal himself

1. *Vinayakrao v. Bansaoradas* (1870) 7 B H. C. O. C. 90

2. *Shamlal v. Chhabilal*, 23 All. 220; *Sheoprasad v. Mataprasad*, 27 All. 73.

3. *Narayan Coomart Dohi v. Shajani Kanta Chatterjee* (1894) 23 Cal. 14.

4. *Ibid.* at pp 20, 21.

respecting the subject-matter of the contract or transaction which would be likely to influence the conduct of the principal or his representative.¹ Where any question arises as to the validity of any such contract or transaction, or of any gift made by a principal to his agent, the burden of proving that no advantage was taken by the agent of his position, or of the confidence reposed in him, and that the transaction was entered into in perfectly good faith and after full disclosure, lies upon the agent.²

So, where a manager of a bank, who was permitted to carry on a separate business on his own account, made advances for the purposes of such business, upon bills which he had not indorsed and the drawers and acceptors of the bills became insolvent, it was held that the manager was bound to make good the loss as he ought not to have granted himself any accommodation nor acquired any personal benefit in the course of his agency, without bringing all the circumstances most fully and fairly to the notice of the directors.³ An agent for the management of trust property purchasing part of such property from the *cestui qua trust* must, in order to support the transaction, show not only that he gave full value therefor, but also that he dealt at arm's length, and fully disclosed everything known to him which tended to enhance the value thereof.⁴ So also steward contracting with his employer for a lease must show that he is giving as high rent as it would have been his duty to obtain from a third person, and that his employer was fully informed of every circumstance tending to demonstrate the value of the property which was or ought to have been within the steward's knowledge.⁵

An agent for the vendor of property is precluded from contracting with the purchaser for the payment of commission unless he makes full disclosure to both vendor and purchaser.⁶

A director, proposes to contract with his company, it being provided by the articles of association that directors may contract with the company on disclosing their interest. It is his duty to declare the full extent and exact nature of his interest, not merely that he has an interest.⁷ So also, a solicitor purchasing property from his client's trustee in bankruptcy, must make a full disclosure of all the knowledge acquired by him respecting such property during the time when he was acting as solicitor for the bankrupt.⁸ A solicitor purchased property from a former client, and concealed a material fact. The transaction was set aside, although there was another solicitor acting on

1. See Ill. (b), section 215, Indian Contract Act, 1872, cited at p. 353 Bowstead, Art. 52, p. 105 and the authorities cited therein.

2. Bowstead, Art. 52, pp. 105, 106

3. *Guthrie v. Campbell* (1854), 1 Jur. (N. S.) 131.

4. *King v. Anderson*, 8 Ir. R. Eq. 147.

5. *Selvey v. Rhoades* (1894), 2 S. & S. 41; *Watt v. Goss*, 2 S. & L. 492.

6. *Fullwood v. Hurley* (1928) 1 K. B. 498—96 L. J. K. B. 976, C. A.

7. *Imperial Mercantile Credit Co., v. Coleman* (1873) L. R. 6 H. L. 189; *Ginsburgh v. Barnes*, 1900 A. C. 240; *Compare Chesterfield Colliery Co., v. Black*, 87 L. T. 740.

8. *Ludgate Trustees v. Peard*, 35 Ch. D. 500; *Bonwell v. Coake* (1884), 27 Ch. D. 424.

behalf of the plaintiff.¹ But the rule that an agent must disclose knowledge acquired by him as such, does not, in general, apply where the agent has ceased to act, and there is another agent, with equal means of knowledge, acting for the principal in the transaction.²

An agent may purchase property from his principal provided that he deals at arm's length and fully discloses all that he knows respecting the property; but if any underhand dealing or concealment appears, the transaction may be set aside at the instance of the principal.³ So, where an agent purchases his principal's property in the name of a third person, the transaction will be set aside without inquiry as to the inadequacy of the price. On this ground a specific performance of a contract by a director of a railway company with the company to take refreshment room was refused against the company.⁴

Where a solicitor takes a mortgage from his client the court will not enforce any unusual stipulations in the mortgage disadvantageous to the client⁵ and will restrain the solicitor from exercising his rights as mortgagee in an unfair or inequitable manner.⁶ Where a power of sale exercisable at any time was inserted in such a mortgage without the usual proviso requiring interest to be in arrear or notice to be given, and the solicitor sold the property under the power, he was held liable to the client in damages as for an improper sale, it not being shown that he had explained to the client the unusual nature of the power.⁷

A solicitor purchasing property from his client must, in order to support it, show that the price paid by him was adequate, that he took no advantage of his position, and that the sale was as advantageous to the client as any that the solicitor could have obtained, with the exercise of due diligence, from a third person.⁸ Where, however, the principal had distinct notice at the time of the transaction that the agent was one of the beneficial purchasers and took no proceedings to set it aside for more than six years, the property having advanced in value in the meantime, he was held to have lost his remedy by his own laches.⁹

A solicitor is not permitted to bargain with his client for any benefit beyond the amount of his legal remuneration, and during the time he is acting as solicitor for the client he is

Gifts to agents.

1. *Gibbs v Daniel*, (1862), 4 Giff 1.
2. *Scott v Dunbar* (1882), 1 Moll 442. And see *Edwards v. Mayrick* (1842), 2 Ears 160, *Montesquieu v Sandys* (1811), 18 Ves 302.
3. *Mo Pherson v Watt* (1877), 3 App Cas. 254, H. L.; *Murphy v. O'Shea*, 8 Ir. Eq. R 329; *Crosse v. Ballard*, (1790), 2 Cox 253; *Lewis Hillman*, (1852), 3 H. L.; Cas. 607, *H. L. Canc. v. Allen* (1814), 2 Dow 289, H. L.; *Uppington v Bullen*, (1842), 2 Dr & War 184.
4. *Flanagan v G. W. Ry.* (1868), 19 L. T. 345.
5. *Cowdry v. Day* (1859), 29 L. J. Ch. 89; *Eyre v Hughes*, (1876), 2 Ch. D. 148.
6. *Macleod v. Jones* (1883) 24 Ch. D. 289; *Pearson v. Benson* (1860), 28 Beav. 598.
7. *Brady v Prendergast* (1887) 56 L. T. Ch. 790, C. A. *Cockburn v. Edwards*, 18 Ch. D. 449. *Craddock v. Rogers* (1884) 53 L. J. Ch. 968, C. A. Compare *Poolay v. Whetham*, 2 T. L. R. 808 C. A.
8. *Savery v King* (1856), 5 H. L. Cas. 627; *Pivani v. Gibraltar* (1874), L. R. 5 P. C. 516, P. C.; *Wright v. Carter*, (1903) 1 Ch. 27; *Moody v. Cox*, (1917), 2 Ch. 71.
9. *Wentworth v. Lloyd* (1864) 10 H. L. Cas. 589, H. L.

incapable of accepting any gift or reward besides such remuneration, even if there is no suspicion of any fraud, misrepresentation or undue influence.¹ So, where a client, who had recovered certain property after protracted litigation, shortly afterwards conveyed, by deed of gift, a valuable portion of such property to the counsel engaged on his behalf, in consideration of services, etc., rendered in connection with its recovery, the deed was set aside on the ground of want of independent advice.² So also where a client settled property in trust for himself for life, and then for his niece, who was the wife of his solicitor, for her separate use, the deed was set aside on the ground that the client had not had independent advice.³ So the executor of a deceased client was held to be entitled to have a gift from the deceased to her solicitor set aside, although the deceased, after the confidential relationship had ceased, had expressed her intention to abide by the gift, the circumstances not being such as would have debarred her, at the time of her death, from having it set aside.⁴ This rule, however, does not apply to gifts by will;⁵ and, except in the case of solicitor and client, the general rule is that a gift *inter vivos* from principal to agent is valid if the agent proves that there was no undue influence on his part.⁶

As a general rule it is most undesirable that a person who has acted as a pleader or solicitor for a party to a suit or is interested therein should become the purchaser of that party's property when made the subject of a judicial sale in that suit and such transaction should be viewed with great strictness.⁷ But the pleaders of the parties are not altogether incapacitated on that account to make such purchases⁸ provided they can show the utmost good faith and that their conduct in making such purchases was free from all suspicion. So a pleader who is instructed to obtain the permission of the court and bid on behalf of the execution creditor at a sale in execution of a decree is not under an actual incapacity to purchase on his own account, but the onus lies heavily on him to prove the transaction free from all suspicion on account of the fiduciary and confidential situation in which he stands in the matter.⁹ He should give his client information of his intention to bid on his own account and obtain the court's permission.¹⁰

It has been held under the English law that where an agent who is employed to purchase property on behalf of his principal, purchases it in his own behalf, and it is conveyed or

Agent purchasing property becomes a trustee.

1. *Morgan v. Minett*, 6 Ch. D. 638; *O'Brien v. Lewis* 32 L. J. Oh. 569; *Wright v. Proud* (1806), 13 Ves. 138. *Wright v. Carter*, (1903) 1 Ch. 27.
2. *Brown v. Kennedy* (1864) 33 L. J. Oh. 342; *Rhodes v. Bate*, (1865) L. R. 1 Ch. 252.
3. *Liles v. Terry*, (1895) 2 Q. B. 679. *Lloyd v. Coote*, (1915) 1 K. B. 242.
4. *Tvars v. Aleop*, (1888), 59 L. T. 367, O. A.
5. *Purfitt v. Lawless* (1872), L. B. 2 P. 462; *Walker v. Smith*, (1861) 29 Beav. 394; *Barry v. Butlin* (1838), 2 Moo. P. C. 480, P. C.
6. *Hunter v. Atkins*, (1882) 2 Myl. & K. 113.
7. *Shahk Ajmuddin v. Hari*, 1877 P. J. 162.
8. *Alagirisami v. Ramnathan*, 10 Mad. 11.
9. *Subbarayudu v. Kottaya*, 15 Mad. 389.
10. *Ibid*; see also *Greenlaw v. King*. 3 Beav. 49.

transferred or otherwise made over to him, he becomes a trustee thereof for the principal.¹

60. Agent must not use material or information acquired in course of agency.

No agent is permitted, unless with the consent of his principal, either during or after the termination of the agency, to make use in any manner prejudicial to the interests of the principal, of any materials or information acquired in the course of the agency.² "The duty of an attorney to be true to his client or of an agent to be faithful to his principal does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term". So observed the court in a case in America in which an agent, who, by reason of his employment to assist his principals in selling land in a tract on which they had option and which they were exploiting, had learned of the location, value, and possibilities of the tract and who were its owners, was not allowed by renouncing his agency, to purchase the land on his own account and thus defeat the purpose of his principals and was charged as trustee for his principals in respect of the land he had purchased in violation of this duty.³ So, where a barrister, who was employed as a legal adviser and confidential agent, having acquired a knowledge of the extent of his client's property and liabilities purchased certain charges on the client's estate for less than their nominal value, after he had ceased to act for the client, it was held that he was only entitled to recover from the client the amount actually paid for the charges with interest, he having purchased them without the consent of the client.⁴ So where an agent acquires information respecting trade secrets, formalities, list of customers and the like, under an express or implied contract not to disclose it⁵ or under such circumstances as made it confidential,⁶ he and his confederates usually, may be restrained, either during or after the determination of the agency, from practically appropriating this property of the principal by using the information so acquired to the principal's detriment.⁷ In a variety of cases, the former agent has been restrained on this ground from using lists of customers, codes, diagrams, patterns, catalogues, price lists etc., which constituted the principal's property, and which the agent acquired or copied without his principal's consent, to their subsequent use while he was in the principal's employment.⁸ The principle involved in

1. *Lees v. Nuttall* (1834) 2 Myl. & K 819; *Austin v. Chambers*, (1837), 6 Cl. & F.L., H. L.; *Bartlett v. Pickering*, 1 Cox 15, Bowstead, Art. 51, p. 105.
2. Bowstead, Art. 53, p. 109 citing *Robb v. Green*, (1895) 2 Q.B. 315, *Louis v. Smellie* (1895), 73 L.T. 228, C.A., *Lamb v. Evans*, (1893) 1 Ch. 218; *Liverpool Victoria, etc. Socy. v. Houghton*, (1901) 3 F.42; *Kitchins v. Gruban*, (1909) 1 Ch. 413; *Amber Suez etc., Co. v. Menzel*, (1913) 2 Ch. 239.
3. *Twice v. Comstock*, 57 C.C.A. 846; *Dennison v. Aldrich*, 114 Mo. App. 700.
4. *Carter v. Palmer*, 8 O.&F. 657, *Hobday v. Peters*, 29 L.J. Ch. 980; *Patten v. Hamilton* 2 Coll. 546.
5. See *Katir*, p. 614 and the American authorities cited therein.
6. *Ibid.* See also *Kirchner v. Gruban*, (1909) 1 Ch. 413.
7. *Meechem*, §. 1210.
8. *Meechem*, §. 1211; *Katir*, p. 614.

this rule has been adopted in section 126 of the Indian Evidence Act, 1872, which runs thus:- "No barrister, attorney, pleader or vakil shall at any time be permitted unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney, or vakil by or on behalf of his client, or to state the contents of condition or any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Exceptions.

This rule, however, does not apply to the experience, skill and training which the agent acquires in the ordinary course of his agency.¹ "Every agent has a lawful right to carry with him into a new employment all the skill and knowledge acquired in his previous engagement and nothing short of an express contract on his part not do so, will debar him, and then only under the strict rules of law especially established to protect trade secrets".² So, although patents for invention made by others and used in the business of agency by an agent are also protected by the rule like other property of the principal, yet if the invention was made by the agent himself even during the continuance of the agency and even where the agent's attention to the matter was the result of the knowledge or information acquired in the principal's business, it is not covered by the rule and the principal cannot claim it as fruit of the agency or as the result of the relation unless the agent was employed by the principal to make invention or there was an express contract that any invention made by the agent during the course of the agency will belong to the principal.³

61. Agent's duty to pay to the principal all the sums received on the principal's account.

Subject to such deductions as an agent is allowed to make in respect of advances made or expenses properly incurred in conducting the business of the agency and in respect of any remuneration to which he may be entitled for the work done as agent and subject to his right to interplead in respect of any sum where the principal's title is contested as regards it by some third person every agent is bound to pay to his principal all sums received on his account. Section 218 of the Indian Contract Act provides as follows:—

Subject to such deductions,⁴ the agent is bound to pay to his principal all sums received on his account.

(S. 218, *Indian Contract Act, 1872*).

The English law on the subject is thus stated by Bowstead:⁵

1. Meehem, §. 1212.

2. *New Era Gas Co., v. Shannon*, 44 Ill. App. 477. See also *Proctor v. Mackin*, 93 Fed. 878 Cf. *Trago v. Hunt*, 1896 A. C. 7.

3. See Katiar, p. 615 and the American authorities cited therein.

4. As enumerated in §. 217 of the Indian Contract Act, 1872, see *infra*.

5. Article 48, p. 96.

"Subject to the provisions of Article 79,¹ every agent who receives money to the use of his principal is bound to pay over or account for such money to the principal, notwithstanding claims made by third persons in respect thereof, even if the money were received in respect of a void or illegal transaction. Provided that, where money is obtained by an agent wrongfully, or is paid to him under a mistake of fact or for a consideration which fails, he may show that he has repaid it to the person from whom he so obtained it or who so paid it to him; and where money is paid to him in respect of a voidable contract; he may show that the contract has been rescinded, and the money repaid, even if the contract was rescinded solely on the ground of his own fraud. Provided also, that no principal can enforce an unlawful transaction between himself and his agent.

"An agent who receives money to the use of two or more principals jointly is bound to account to them jointly, and is not bound to pay over to one or more of them the whole or any part of such money without the consent of the other or others, whatever may be the rights of the principals in respect of such money as between themselves.

"Every agent, in accounting for money received to the use of his principal, is entitled to take credit for all just allowances, and for any sums expended by him with the authority of the principal, even if they were expended for an unlawful purpose; but authority to deal with money in an unlawful manner may be revoked at any time before the money has been actually paid away".

The fact that the money was received by the agent under an illegal² or void³ contract, or claims are made in respect of it by third persons⁴ is no valid excuse for the agent for withholding payment.⁵ If an agent receive money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received, and cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party had waived by paying the money.⁶ Upon this principle it has been held that an agent receiving cesses from tenants which are illegal under the Bengal Tenancy Act,⁷ or moneys due to the principal under a wagering contract,⁸ is bound under the provisions of section 218 of the Indian Contract Act to pay the same to the principal. But this rule does not apply where the contract of

Payment in respect of void or illegal transaction

1 See *infra*. This Article relates to agent's right to interplead

2 *Bangfield v Wilson*, 16 L. J. Ex. 44, *Farmer v Russell*, 1 B. & P. 296, *Tenant v. ElHot*, 1 B. & P. 3

3 *De Mattos v. Benjamin*, 63 L. J. Q. B. 248, *Bridger v Savages*, 15 Q. B. D. 863, see also *Mechem*, §. 1832

4 See *Katier*, p. 562 and the authorities cited therein

5 *Bhole Nath v. Mul Chand*, 52 All. 639

6 *Tenant v. Elliot* (1797) 1 B. & P., see also *Palanappa Chettiar v. Choekalingam Chettiar* (1931) 44 Mad. 334=60 L. C. 127.

7 *Nagendrabala v. Gurus Dayal* (1903) 30 Cal. 1011

8 *Bhole Nath v. Mul Chand*, 52 All. 639.

agency is itself illegal.¹ And it is open to an agent who has received money in respect of a void transaction, or otherwise under such circumstances that he was bound to repay it, to show in an action by the principal that it has been repaid to the person from whom it was received.² In *Murray v. Mann*³ an agent sold a horse and received the purchase-money. The sale was subsequently rescinded on the ground of the agent's fraud, and the purchase-money was repaid. The agent was not held liable to the principal for the amount of the purchase-money.

A turf commission agent employed to make bets must pay over to the principal the amount of any winnings actually received by him in respect of such bets, though the bets themselves are void by statute (8 and 9 vict. C. 109) and though in consequence of the provisions of the Gaming Act, 1892 (Engl.) he would not be able to recover from the principal the amount of any losses paid in respect of the bets.⁴

As already stated, where the contract of agency itself is unlawful and unenforceable at law, the rule does not apply.⁵ But in such case as well the agent must return to the principal whatever he has received in advance, if the principal has not employed him on such contract, and he cannot plead the illegality of the contract in defence.⁶

Other cases.

An agent who receives money for the principal's use cannot dispute the claim of the principal on the ground that other persons are interested in the subject-matter of agency, their claims being a matter between them and principal with which the agent has nothing to do.⁷ So, where a ship which is the property of A is transferred to B as security for a debt and B insures the ship for and on behalf of A and company, and charges them with the premiums, the ship being lost and B receiving the insurance money must pay it over to A and company after deducting the amount of his debt, and cannot set up A's title in defence.⁸ A solicitor who has received money on behalf of his client must account to him therefor and cannot set up a *jus tertii*.⁹

Where money is paid to an agent on account of his principal, by a person who is indebted to the agent also, he must pay over the money to the principal, and is not entitled to appropriate it to his own debt.¹⁰ Thus the agent is even estopped from setting up his adverse title to such money.

1. *Sykes v. Bandon* (1879) 11 Ch. D. 170, per Jessel M. R., at pp 193 *et seq.*, where the earlier cases are considered and explained.
2. *Murray v. Mann* (1848) 2 Ex. 538; *Shoe v. Clarkson* (1810) 12 East, 507—11 R. R. 473. In the former case the contract under which the payment was made was rescinded on the ground of the agent's fraud.
3. (1848), 2 Ex. 538—17 L. J. Ex. 256.
4. *De Mattos v. Benjamin*, (1894) 63 L. J. Q. B. 248. *Bridger v. Savages* (1885), 18 Q. B. D. 363, overruling *Bryer v. Adams*, (1857), 26 L. J. Ch. 841.
5. See also *Booth v. Hodgson*, 6 T. R. 405.
6. *Kiewert v. Rindskopf*, 32 Am. Rep. 731; *Clarke v. Brown*, 77 Ca. 606; *Wars v. Spinney*, 13 Am. Cas. 1181.
7. *Roberts v. Ogilby*, 3 Price 269.
8. *Dixon v. Hamond*, (1818) 2 B. & A. 310.
9. *Maurice v. Maltz*, (1887) 2 K. B. 142.
10. *Health v. Chilton* (1844) 12 M. & W. 632; *Shaw v. Pictan*, (1825) 4 B. & C. 713.

An insurance broker receives notice that the assured under a policy is entitled to the return of a portion of certain premiums held by the broker. The broker is entitled to deduct such portion in an action by the underwriters for the full premiums, if he acts as agent for both parties.¹

A factor raises money by wrongfully pledging the goods of his principal. The principal may, if he thinks fit, adopt the transaction, and treat the money raised as money had and received to his use.²

Although a *tahsildar* is bound to account to his landlord for all payments voluntarily made by the tenants in excess of the rents due from him yet, if the sums are exacted by the *tahsildar* within the meaning of section 10 of Act X of 1859, ³ they cannot be recovered by the landlord in a civil suit.

Where, however, money is obtained by an agent wrongfully or is paid to him under a mistake of fact, or for a consideration which fails and the agent is personally liable to repay it to the person from whom he obtains it or on discovering the wrongfulness or mistake or failure of consideration, repays it to such person,⁴ he is not liable to account for it to the principal as the claim of such person to repayment is a claim between him and the agent and not one between him and the principal and, therefore, the agent is justified in refusing payment to the principal. So also where money is paid to him in respect of a voidable contract, he may show that the contract has been rescinded and the money repaid, even if the contract was rescinded solely on the ground of his own fraud.⁵

Exceptions.

An agent who receives money to the use of two or more principals jointly is bound to account to them jointly, and is not bound to pay over to one or more of them the whole or any part of such money without the consent of the other or others, whatever may be the rights of the principals in respect of such money as between themselves.⁶ The agent, in such cases, is not discharged from liability by accounting or paying to one or more of them unless by the authority of all,⁷ or unless the principals constitute a firm of partnership and the business in which the agent is employed and in respect of which the money is received is a partnership business. In such cases all the principals must join in a suit against the agent and he is not liable to render separate accounts in separate suits to each of them.⁸ The agent may, however, either expressly or by impli-

Agent of joint principals.

1. *Shes v. Clarkson*, (1810) 12 East 507.

2. *Bonai v. Steward* (1842), 5 Scott N. N. 1, 26.

3. *Nobin Chander Roy Chowdhry v. Gooroo Gubind Sarmah Mojeomdar*, 14 W. R. 447. But see *Nagendrabala Dassi v. Guru Doyal Mukerji*, 30 Cal. 1011.

4. See Bowstead, Art. 127, p. 207; see also under 'Agent's liability to third persons, *infra*.

5. See Bowstead, Art. 48, p. 96; *Murray v. Mann*, (1848), 2 Ex. 688; *Shes v. Clarkson* (1810), 12 East 507.

6. *Hatall v. Griffith* (1834), 2 C. & M. 679; *Heath v. Chilton* (1844), 12 M. & W. 632; *Lee v. Sankey* (1872), L. R. 15 Eq. 204; *Innes v. Stephenson*, 1 M. & E. 345; *Jones v. Cuthbertson*, L. R. 8 Q. B. 594; Bowstead, Art. 48, p. 96.

7. *Jagdish Prasad Sahai v. Mt. Rajo Kuer*, 1928 Pat. 177.

8. *Kadir Bakh v. Ratcharandus*, 62 L. C. 266; *Trustees v. Duperay*, 31 L. Aun. 205.

ation assume the duty to account to each of the principals separately and in that event each may demand an accounting for his respective interest.¹

Accounting
by joint
agents and
sub-agents.

Where two or more agents have jointly undertaken to act they are jointly liable to account.² But one is not ordinarily liable for the default of another which he did not sanction or participate in, and which was not made possible by any neglect of his own.³ Sub-agents, as has been already pointed out,⁴ are ordinarily responsible to their employers only.⁵ Where, however, funds of the principal came into the hand of a sub-agent or even a third person who has no duty in respect thereof but to pay them over to the person to whom they belong, the principal by timely information of his claim, may recover them directly from such sub-agent.⁶

62. Deductions which the agent is allowed to make.

An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

(S. 217, *Indian Contract Act*, 1872).

The right conferred in this manner is in the nature of retainer, and assumes the agent to have money for which he is accountable to the principal in his hands or under his control. S. 221 of the Contract Act, further gives the agent a possessory lien on the principal's property in his custody. Nothing in the Act expressly gives him an equitable lien, i.e., a right to have his claims satisfied, in priority to general creditors, out of specific funds of the principal which are not under his control. Such a right, however, may exist in particular cases. In the special case of a solicitor it is well settled that a judgment which he has obtained for his client by his labour or his money should stand so far as needful, as security for his costs, and he is entitled to have its proceeds pass through his hands. The courts will not allow any collusive arrangement between parties to deprive the solicitor of this benefit.⁷ But intention to defraud the successful party's solicitor is not presumed from the mere fact of the action being settled without his assistance.⁸ It has been commented upon that it seems doubtful whether this rule can properly be regarded as having anything to do with the general law of agency, and therefore whether it can furnish any safe guidance for the rule laid down above.⁹

1. *Lawless v. Lawless*, 39 Mo. App. 539.

2. *Mason v. Wolkowick*, 150 Fed. 699.

3. *Colburn v. Grant*, 16 App. D. C. 107; *Barroll v. Forman*, 25 Md., *Brusen v. Gullet*, 4 L. R. A. 529; See *Katlar*, p. 565.

4. See notes on pages 303 to 309.

5. *Mechem*, §. 1330. *Guelich v. National State Bank*, 56 Iowa 434; *Sergeant v. Emien*, 131 Pa 580.

6. See *Mechem*, §. 1321.

7. *Ex parte Morrison* (1868) L. R. 4 Q. B. 153, 156. See *Cullianji Sangthoy v. Raghonji Vifpat* (1906) 30 Bom. 27.

8. *The "Hope"* (1883) 9 P. D. 144.

9. See *Follock & Mullis*, p. 583.

An agreement entered into between a pleader and his client respecting his remuneration was void under the provisions of S. 28 of the Legal Practitioners Act, 1879, if not reduced to writing and filed in court; but the pleader did not, by reason of that fact, lose his right under the present section to retain disbursements made by him on his client's behalf out of the sums that may be received by him on account of his client in the case.¹

The word "business" in section 217 of the Indian Contract Act means the same business or a continuing business. Hence money received by an agent in one business cannot be retained by him on account of remuneration alleged to be due to him in a different business altogether which had long since been completed.²

A *pakka adatia* is entitled to the charges of remitting to the constituent the profits made by him on the constituent's behalf, as an agent is under section 217 of the Indian Contract Act.³

The subject will be dealt with in more detail in the following chapter.

63. Liability to pay interest when arises.

No interest is payable by an agent in respect of money received by him on his principal's behalf, except under some contract express or implied, or where there has been some default on his part, such as a dealing with the money in breach of duty, or a failure to pay it over at the principal's request, in which cases interest is payable from the date of default. The agent must also pay interest in all cases of fraud, and on all bribes and secret profits received by him during his agency,⁴ or when he has himself realized interest on the amount due from him by investment⁵ or by use in his own business.⁶ But where he has been guilty of a fraudulent concealment of the realisation or has retained the money without reasonable excuse in spite of a demand from the principal therefor⁷ he must pay interest on it from the date of receipt in case of fraudulent concealment or from date of demand in any other case, at such rate as the court thinks proper, by way of damages for detaining the principal's money without reasonable excuse.⁸ Interest in such cases is also allowed upon the ground that the agent has retained in his possession money of which it was his duty to make some other disposition.⁹ For instance, if he has received money to be de-

1. *Subba Pillai v Ramasami Ayyar*, (1903) 27 Mad 712 S. 28 of the Act of 1879 has been repealed by the Legal Practitioners (Fees) Act, 1926, but the case cited is a useful illustration of the principal involved. See Pollock & Mulla, p. 584.

2. *Sardar Mohammad v Babu Daspanahi* 49 P R. 1835.

3. *Kadarnal Bhuramal v Surajmal Govindram*, (1907) 33 Bom. 364.

4. Halebury, Vol. I (2nd Edn.), Art. 423, p. 249 and the authorities cited therein.

5. *Ganesa Sethuram v Ramaswami Served*, 42 L. C. 319; *Bassett v Kinney*, 24 Conn. 267; *Williams v Storrs*, 6 Johns. (N. Y.) Ch. 353; *Landis v Scott*, 32 Pa. 495.

6. *Hardwick v Vernon*, 14 Ves 504.

7. *Edge 11 v. Day*, L. R. 1 C. P. 80.

8. *Harcourt v Blaine*, 56 L. J. Q. B. 511, C. A.; See *Katlar* p. 567.

9. *Waddel v. Swann*, 91. N. C. 108;

Burdick v. Garrick, L. R. 5 Ch. 283.

voted to a specific purpose and retains and applies it to his own use,¹ or where he is instructed to give notice of receipts so that the principal may advise a proper disposition and fails to give such notice within a reasonable time.² Where the agent is entitled to retain money by virtue of some lien or charge he is, of course, not liable to pay interest for such retention.³ Some American authorities even go to the length of holding that it is the duty of an agent who has collected money for his principal to give him notice of that fact within reasonable time and that failing in this duty he is properly chargeable with interest from the time when such notice should have been given even though he had acted in good faith.⁴

64. Agent's duty to keep principal's property separate, and to preserve correct accounts.

In order further to safeguard the principal's interests from being jeopardised by the agent by taking undue advantage of his fiduciary position the law provides that it is the duty of the agent to keep the property and funds of his principal separate from his own⁵ and to keep and preserve and at all proper times be ready to produce true and correct accounts and statements of the business with which he is entrusted, together with all such receipts, vouchers and evidence of dealing as may be necessary to fully and fairly disclose the details of the transactions, not only with a view to protect the principal from further liability but also to furnish the means for a complete settlement of accounts between himself and the principal.⁶

The English rule on the subject is thus laid down by Bowstead:⁷

"It is the duty of every agent—

- (a) to keep the money and property of his principal separate from his own and from that of other persons;
- (b) to preserve and be constantly ready with correct accounts of all his dealings and transactions in the course of his agency;
- (c) to produce to the principal, or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs; and
- (d) to pay over to the principal, on request, money received in the course of the agency to the use of the principal.

Where an agent is permitted to retain for investment money belonging to his principal, he is in the position of a trustee".

1. *Hill v. Hunt*, 9 Gray (Mass.) 66; *Schleser v. Niell*, 91 Mich. 321.

2. *Dodge v. Perkins*, 9 Pick (Mass.) 368; *Clark v. Noody*, 17 Mass. 14.

3. *Thompson v. Stewart*, 3 Conn. 171.

4. See Mechem, §. 1341.

5. See Mechem, §. 1335; Bowstead, Art. 46, p. 93

6. See Mechem, §. 1335.

7. Art. 46, p. 93

Effect of mingling principal's property with his own.

Where an agent fails to keep and preserve correct accounts, and is called upon for an account of his agency, everything will be presumed against him that is consistent with established facts.¹ The agent's failure to keep correct accounts in violation of his obvious duty authorises unfavourable inferences and subjects him when called for an account to a heavy burden of suspicion as well as of proof.² All the more so will this be true where it appears that the agent has destroyed such accounts as he had as the maxim '*Omnia presumuntur contra spoliatores*' will apply to such case.³ So, if he mixes the property of the principal with his own, everything not proved to be his own will be deemed to be the principal's.⁴ If, without authority, he commingles in his dealings the goods of his principal and of himself, the principal will have the first charge upon the proceeds.⁵ If he mingles the funds of his principal with his own and the whole is lost, he must bear the whole loss and indemnify the principal for his funds.⁶ Thus, where an agent pay his principal's money into his own banking account, he is responsible for the amount, in the event of the failure of the banker, even if acting gratuitously,⁷ and he must pay the amount to the principal.⁸ So, an attorney who deposits money of his client in a solvent bank in his own name without any indication of the trust is liable for a loss occasioned by the subsequent failure of the bank, notwithstanding the fact that the deposit was made in a separate account containing only the principal's money, and that the attorney was prevented from transmitting it by garnishment proceedings against him.⁹ But if the agent deposits the principal's money in the name of the principal or in some such way as to distinguish it as the principal's money by some indication on the books of the bank, he is not liable if the bank fails and the money is lost.¹⁰

Where an agent mixed up his money with the moneys of his principal the onus clearly lies on the agent to prove that in any particular transaction which he claims to be his own he employed his own moneys.¹¹

An agent who improperly refuses to pay over money on request is chargeable with interest from the date of the request.¹²

Where an agent mixed up his private transactions with those of his principal, and failed to prove that the money was

1. *Gray v. Haig*, (1854), 20 Beav. 219; *Jenkins v. Gould* (1827), 3 Russ. 385.
2. *Paterson v. Poignard*, 47 Ky. 819; *Illinois Lenin Co. v. Hough*, 91 Ill. 63; *Armour v. Gaffey*, 30 N. Y. App. Div. 121.
3. *Armour v. Gaffey*, *supra*; See also *Gray v. Hong*, *Haig v. Gray*, 20 Beav. 219.
4. *Lupton v. White* (1808), 15 Ves 432.
5. *Kennett v. Guano Co. v. Wappoo Mills*, 119 Ga. 776; *Simmons v. Looney*, 41 W. va. 738.
6. *In re Hedges Estate*, 68 Vt. 70; *Katlar*, p. 568.
7. *Massey v. Banner*, 1 Jd. & W. 241.
8. *Williams v. Williams*, 42 Am. Rep. 708; See *Katlar*, p. 369 and the authorities cited therein.
9. *Natner v. Dolan*, 58 Amer. Rep. 61.
10. *Norwood v. Harness*, 49 Am. Rep. 739; *State v. Greensdale*, 55 Am. Rep. 752.
11. *Sirdhar Vasant Rao v. Gopal Rao*, A. I. R. 1940 Mad. 299= 189 I. C. 626.
12. *Harsant v. Blaine*, (1887), 56 L. J. Q. B. 511, C.A.

borrowed for the benefit of his principal and her ward, and where the transaction on the part of the lender was found not to be *bona fide* inasmuch as he did not satisfy himself that the agent was borrowing for the legal necessity of the ward's estate, he was held personally liable.¹ Every presumption will be made against the agent where he makes it impossible for the principal to distinguish his property.² Even if the agent deposits assets belonging to his principal with bankers on their bank notes carrying interest and the bankers shortly fail, there being no necessity for such deposit, he will be held liable.³

Mode of keeping accounts.

As it is the duty of the agent to keep and preserve and at all proper times to be ready to produce true and correct accounts of all his dealings in the business of agency as well as all the property and funds of the principal in his hand, the account should be such as would be sufficient not only to protect the principal from future liability for such transactions but also to furnish a satisfactory basis for a complete settlement of account between the agent and the principal.⁴ It is his duty to keep and preserve true and correct accounts between himself and his principal and to furnish him detailed and itemised statements of receipts and expenditures. The statements must be of such a character as to enable the principal to make some reasonable test of their honesty and accuracy.⁵ For instance, where an agent is employed to sell the goods of several persons as for example a factor, he should keep distinct accounts of sale made for each of the principals and if he should sell on credit and accept promotes for the price, he should take separate pro-notes for the amount due to each principal unless, of course, he sells as a commission merchant holding himself responsible to the principal as vendee thereof. If he does otherwise it may result in a reasonable change in the right of each principal in case of a failure of due payment and a difficulty may arise in ascertaining the exact amount of property of each in the respective notes so taken.⁶ So an agent employed by a testator to collect rents and continued in employment by his trustees after his death is not exonerated from this duty by furnishing accounts showing only the rents received and the names of the tenants who paid them, but must furnish such an account as would identify the particular properties from which such rents arose.⁷

No particular mode of preparing accounts is, however, prescribed by the law, any form of accounts which can furnish a satisfactory basis of settlement of disputes that may arise as regards accounting between the principal and agent being deemed sufficient.⁸ Technical nicety of book-keeping is not, of course, in general to be expected. What is a reasonable

1. *Jaggurnath Roy Chowdhry v Minorakha Dassie*, 2 W. R., 156.

2. *Almory v. Delamare*, 1 Str., 504.

3. *Darke v. Martyn*, 1 Beav. 525; *Fletcher v. Walker*, 3 Madd., 73.

4. See *Mecham*, §. 1334.

5. See *Katlar*, pp. 569, 570 and the American authorities cited therein.

6. *Clarke v. Topping*, 9 Beav. 284.

7. *Finch v. Burden*, 12 L. T. 302.

8. See *Mecham*, §. 1334; *Katlar*, p. 570.

fulfilment of the agent's duty in this case as in other depends upon the particular circumstances requiring care and diligence.¹ The account kept should, however, be true and honest. It has accordingly been held that an agent who knowingly renders false accounts, charging his principal with more than the true amount or crediting him with less is guilty of such disloyalty as to justify his discharge and to forfeit his right to compensation.² It has also been held that although it is the agent's duty to keep correct accounts yet if the principal himself has by his own interference or looseness of methods created or so contributed to such confusion as to render an absolutely satisfactory accounting impossible, the agent ought not to be held to the most rigid rule³ and where the principal has, either expressly or by implication, assured the agent and reasonably led him to believe that no formal accounts would be required or that a particular method of accounting would be satisfactory he cannot complain that the agent, if he has acted in good faith, has not kept the accounts with the strictness which might otherwise have been required.⁴ But apart from this, the duty of an agent to keep and preserve true statements of correct accounts being a necessary sequel to his duty to account is not fulfilled by reporting to his principal that he has spent a round sum of money in prosecuting his employment, and then swearing to the fact in a suit to recover the sum.⁵

The agent's duty to keep and render proper accounts involves the right of the principal to assure himself that the accounts are proper and correct. Measures taken in good faith by the principal to secure a proper accounting and to assure himself of its property, are, therefore, not in violation of the contract, although they may not be within its express terms.⁶ It is therefore the duty of an agent to produce to the principal, or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs.⁷ The principal, however, cannot call upon an agent to produce documents, etc., to an improper person, such as a rival or unfriendly person.⁸ The right of the principal to inspect the agent's accounts is confined only to such entries as relate to transaction concerning him and the agent is justified in refusing to show other entries with which the plaintiff has no concern.⁹ Where an agent was engaged to sell the principal's patent supplies according to the terms agreed and the principal suspecting a violation of the terms filed a bill against the agent for an account and demanded inspection of his account books, it

Principal's right to inspect the agent's accounts.

1. *Makepeace v. Rogers*, 34 L. J. Ch. 367.

2. *Little v. Phipps*, 208 Mass. 331; *Boston Deep Sea Fishing Co., v. Ansell*, 39 Ch. D. 339; *Hutchinson v. Fleming*, 40 Can. Sup. Ct. 134.

3. *Robbins v. Robbins*, 3 Atl. 264; *Macauley v. Kirod*, 28 S. W. 782.

4. *Carran v. Chapotel*, 47 La. 409; *Hamilton v. Hamilton*, 15 N. Y. App. 47.

5. *Wolf Co. v. Salem*, 33 Ill. App. 414; *Gladiator Misco Co. v. Steel*, 132 Iowa 446.

6. *Walker v. Hancock Mut. L. Ins. Co.*, 1922 Am. Cas. Am. 526.

7. *Bowstead*, Art. 46, p. 93; *Halebury*, Vol. I, 2nd Edn; Art. 418, p. 246. *Boon v. Webb* (1901) 1 Ch. 59.

8. *Dadswell v. Jacobs*, (1887) 34 Ch. D. 278.

9. *Gerard v. Penwick*, 35 E. R. 494.

was held that the agent was only bound to produce entries showing quality and price of goods sold and must be allowed to seal up names and addresses of his customers.¹

65. Agent's duty to render proper account to the principal.

An agent is bound to render proper accounts to his principal on demand.

(S. 213, *Indian Contract Act, 1872.*)

As between the principal and agent there is a contractual position fortified by fiduciary relations and one of the terms is that the agent should render an account to the principal of his dealings with the property entrusted to him in the course of the mandate.² This duty is elementary, and will be enforced at need by following in the agent's hands property representing money for which he ought to have accounted.³ It is irrespective of any contract to that effect. It is not discharged by merely delivering to the principal a set of written accounts without attending to explain them and produce the vouchers by which the items of disbursement are supported.⁴ The words "on demand" have been thought to suggest that the demand should be made on the agent at his place of business.⁵

The mere production and even inspection by the principal is not the rendition of the account but only preliminary stage towards it, which may be in pursuance of another duty dealt with above and may either ripe into an actual rendition of account by subsequent stages such as explanations by the agent or production and comparison of vouchers etc., etc., which may be necessary for a satisfactory settlement of accounts between the parties.⁶ But if an agent, as for example a factor, or commission merchant, renders to his principal an account of his transactions, the principal must, in general, if he would object to it, do so within reasonable time and if he does not, the agent is justified in treating the principal's silence as admission by the principal that the account so rendered was just and true and that he was willing to be bound by it.⁷ It has been held that the question of what is a reasonable time, in this case as in others, is usually a question of fact,⁸ but where only one inference could be drawn from the facts it may be treated as a question of law which the court itself may determine without reference to jury.⁹ But to give an account delivered the force of an account stated or rendered, because of the silence of the

1. *Hough v. Gasrett*, 44 L. J. Ch. 305.

2. *Raja Bhawani Singh v. Mubahuddin*, 1929 P. O. 126=10 Lah. 352=115 I. C. 729=56 L. A. 170.

3. *Chedworth v. Edwards* (1802) 8 Ves. 46=6 R. R. 212.

4. *Annode v. Dwarkanath* (1881) 6 Cal. 754; *Lawless v. Calcutta Landing and Shipping Co.*, (1881) 7 Cal. 627; *Ram Chander v. Manick Chunder* (1881) 7 Cal. 428; *Shib Chunder v. Chunder Narain* (1904) 32 Cal. 719; *Ram Das v. Bhagwat Das* (1904) 1 All. L. J. 347; *Madhundan v. Rakhal* (1916) 43 Cal. 248, 259-60=30 I. C. 697.

5. *Audinrayana v. Lakshminarayana*, A. I. R. 1940 Mad. 588.

6. *Of Annode Persad v. Diwarkanath*, 6 Cal. 754.

7. *Mechem*, §. 1851 see *Katir*, p. 573, and the American authorities cited therein.

8. *Austin v. Bicker*, 61 N. H. 97; *Lockwood v. Thorne*, 18 N. Y. 285.

9. See *Katir*, p. 574, and the American authorities cited therein.

party receiving it the circumstances must be such as to justify an inference of assent to it. If he has disclaimed all liability on the account, his silence will not be deemed *prima facie* proof of acquiescence and he is not bound to examine its items.¹ The essential thing, in all such cases, is that the facts and circumstances relied upon, as constituting acquiescence, must be such as reasonably lead to the inference that the principal assents to the account as correct.²

Difference between the English & Indian law on the subject.

Under the English law, in the case of a single agency transaction untainted with fraud, or where the agency is not of a fiduciary character, the agent is not bound to render an account in a Court of equity, unless the accounts are so complicated that they cannot be properly investigated in an action at law.³ But in India the courts of law are also courts of equity and the different rules which prevail in England in Courts of equity and courts of law respectively are administered by the same Courts. Hence in India this difference is immaterial. Secondly, in this country a suit for money found due from an agent upon the rendition of account and a suit for rendering an account are identical.⁴ The duty which is imposed by section 213 of the Indian Contract Act to render proper accounts applies universally to all kinds of agents and the distinction which is drawn in England between agencies of fiduciary character and those involving only single transaction, is not observed in India. In fact in India all agencies are regarded to be more or less of a fiduciary character rendering the agents equally liable to the discharge of duties imposed on them by the provisions of the Indian Contract Act, subject of course, to such variations in their extent as are necessary with regard to the nature and circumstances of the relation.⁵

The duty to account is owed by the agent to the principal, and not to other persons. Thus an agent appointed by the administrator of the estate of a deceased person to recover outstanding debts due to the estate is not liable to account on the contract of agency to the person entitled to the estate, and it makes no difference that representation was granted to the administrator as attorney of the mother and guardian of the person entitled to the estate.⁶ Where a trustee managed the trust property through an agent, appointed by him, who received the income and held the title deeds of the trust properties in his possession, and the agent was made a party to an information for an account and scheme, the Court held that he was not a proper party, and that he could only be called upon to account to the trustee.⁷ So also where the plaintiffs, who were

Agent liable to account to principal only.

1. *Guiney v. White*, 63 N. Y. 370.

2. *Ibid*; see also *Woodward v. Suydam*, 11 Ohio 361.

3. See *Bowstead*, Art 54, p 110 and the authorities cited therein.

4. See *Katkar*, p 574.

5. *Jhapathmunesa v. Bamasundari*, 16 C. W. N. 1042. See also *Shivchander Roy v. Chandra Narayan Mukerjee*, 32 Cal 719.

6. See *Katkar*, p 575.

7. *Chidambaram Chetti v. Pichappa Chetti*, (1907), 30 Mad. 243. The suit in this case was founded on the contract of agency.

8. *Attorney-General v. Chesterfield* (Earl of), 18 Beav. 596; *Gibbon v. Barker Tward*, 23 W. R. 242.

landowners in New Zealand and had offices in Glasgow but no office or agency in London, shipped wheat to England for sale in the London market, taking bills of lading on which the wheat was made deliverable to themselves and endorsing these bills to Mathews & Company at Glasgow with instructions as agents of the plaintiff to sell the goods in London; and Mathews & Co., having no house or agency in London endorsed the bills over to the defendant who were corn-factors for the purpose of the sale of the wheat, the endorsement in both cases being merely for the purpose of sale and not for the purpose of passing the property; and the defendants effected the sale and paid the proceeds into their own account, and from time to time made remittances to Mathews & Company, who shortly after failed being indebted to the defendants. The plaintiffs then sued the defendants alleging that the plaintiffs through their agents retained and employed the defendants to effect the sales in question and asking for an account. The defendants denied that they were employed by the plaintiffs and contended that they were only accountable to Mathews and Company. *Held*, that the plaintiffs were not entitled to succeed, as there was no privity of contract between them and the defendants, and the defendants did not stand in any fiduciary character to the plaintiffs so as to entitle them, the latter, to follow the proceeds of the property in the defendant's hands.¹

Duty of
partners to
account.

It is similarly the duty of all the partners to render true accounts and full information of all things affecting the firm to any partner or his legal representative.² Every partner has a right to have access to and to inspect and copy any of the books of the firm.³ And subject to contract between the partners, (a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm name, he shall account for that profit and pay it to the firm, and (b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.⁴ It has been held under the English Law that if no books of accounts are kept at all, or if they are so kept as to be unintelligible, or if they are destroyed or wrongfully withheld and an account is directed, every presumption will be made against those whose negligence or misconduct the non-production of proper accounts is due; if however, all endeavour to avoid to account, the rule does not hold good.⁵ So also a partner must account to the firm for any benefit derived from a transaction effecting or concerning the partnership. Thus he will not be allowed to supply the firm with goods which he has himself bought for his own use at a lower price without informing his partners of the fact.⁶ Shortly, it is his duty to refrain from

1. *New Zealand & Australian Land Co., v. Watson*, L. R. 7 Q. B. D. 374.

2. S. 9, Indian Partnership Act, 1932.

3. *Ibid.*, S. 12.

4. *Ibid.*, S. 16.

5. *Walmaley v. Walmaley*, 3 J. & Lat., 556, Lindl., 808.

6. *Bentley v. Craven*, 18 Beav. 75.

all concealment in the course of the partnership business, and if he obtain or endeavour to obtain the benefit he must account therefor.¹ So also, a partner who renews the lease in his own name as trustee of it with the firm, i. e., the renewing partner is a trustee for himself and his partners, is *cestuis que trustent*, and the position is not improved by the fact that the lessee gives notice of dissolution and of his intention to renew the old lease for his own benefit.²

It has also been held that a partner is not allowed, in transacting the partnership affairs, to carry on for his own sole benefit any separate trade or business which, were it not for his connection with the partnership, he would not have been in a position to carry on. Bound to do his best for the firm, he is not at liberty to labour for himself to their detriment; and if his connection with the firm enables him to acquire gain, he may not appropriate that gain to himself, on the pretence that it arose from a separate transaction with which the firm had nothing to do.³ The rule is not applicable to a really different business carried on by a partner of a firm though some knowledge and information may be used in both.⁴ Further, unless expressly restricted by agreement, a partner may carry on another business privately so long as he does not compete with and is not connected with the business of the firm and so long as he does not represent it to be the business of the firm. He is not bound to account for the profit of non-competing business, even though he may be enabled to push the private trade better than he would otherwise be by reason of his connection with the firm.⁵ So a partner may derive profit in matters entirely outside the scope of, and not in competition with, the business by the use of information acquired in the partnership business.⁶

There is a duty imposed upon the *karta* of a joint family to account. The principle upon which the right to call for the account rests, is not, as has been supposed, the existence of a direct agency or of a partnership where the managing partner may be considered as the agent for his co-partner; but it depends upon the right which the members of a joint Hindu family have to a share of the property. A principle similar to that on which the Court of Equity acts in cases of joint tenants and tenants in common, and not merely in cases of partnership.⁷

Duty of a *Karta* of a joint family to account.

It has been held under the English law that although a promoter of a Company cannot be considered an agent or trustee for a Company, not being in existence at the time, yet the principles of the law of agency and trusteeship are applicable to

Duty of promoters to account.

1. *Russel v. Austwick*, 1 Sim. 52; *Lindley on Partnership*.
2. *Clegg v. Edmondson*, 8. De. G. M. & G. 787. referred to in *Raghoonathdas v. Morariji Jutha*, 16 Bom. 568, 574.
3. *Lindley*, p. 399; *Russel v. Austwick*, 1 Sim. 52; *Lock v. Lynam*, 4 Ir. Ch. 153.
4. *Pulin v. Mahendra*, 1921 Cal. 722.
5. *Mohammad Kamil v. Hedayetulla*, 1926 Cal. 380.
6. *Aur v. Benham*, (1891) 2 Ch. 244. C. A.
7. *Obhey Chunder Roy v. Pearsemohan Gooko*, 18 W. R. F. B., 75.

his case, and he is accountable for all money obtained by him from the funds of the company without the knowledge of the Company.¹

Duty of a factor to account.

Among the most important duties of a factor are those which require him to give to his principal his free and unbiased use of his own discretion and judgment, to keep and render just and true accounts, and to keep the property of his principal unmixed with his own or the property of other person, and when there have been two factors jointly employed and one dies, the survivor is answerable for himself and co-factor.²

What is meant by rendition of account.

As already observed, the duty of the agent to render proper account to his principal is not discharged by a mere production of account books.³ The agent, if so required must present himself in person to explain the items which are questioned by the principal and must be ready with vouchers and particulars necessary for such explanation.⁴ He cannot compel the principal to be satisfied with the agent's general statement, even on oath, that he knows he made proper disposition of the principal's funds, though he cannot give particulars.⁴ Thus, a steward who is appointed to collect rents does not fulfil his duty to render account by showing to his principal's representatives after his death merely the entries of the sums which he had realized and the names of the tenants from whom such realisations were made but must also show what realisations were made from what particular property.⁵ Where, however, the principal by his acts or omissions or by his previous dealings in accounting lets the agent believe or compels him to the course that a particular mode of accounting will be sufficient he cannot subsequently demand from him account in a different and more detailed way. In *Hunter v. Belcher*,⁶ a written agreement between the principal and his travelling agent provided for payment of travelling expenses but did not lay down any mode in which they should be ascertained and stated. Before the agreement the travelling agent had been in the habit of stating after each journey those expenses as a gross sum, omitting all details and this practice continued for some years after it. It was held that a contract so as to state and accept the amount of those expenses was to be implied from this course of conduct and the principal had no power to determine it during the stipulated term.

Before an account shall be deemed as stated or settled it must be approved by the principal himself either expressly or by necessary implication. So, where defendants, the plaintiff's factors at J in India, submitted an account which was examined and allowed by the factory at J again by the Chief Factory at B, but on being sent to plaintiffs it was excepted to in writing

1. *Lydney and Wigpool Iron Ore Co. v. Bird*, L. R., 33 Ch. D., 85.

2. *Holtcomb v. Rivers*, 1 Oh. Cas., 127.

3. *Shtibarkhander Roy v. Chandra Narayan Mukerjee*, 32 Cal. 719; *Annoda Prasad v. Dwarkanath*, *supra*.

4. *Farmer's Warehouse Ass'n v. Montgomery*, 22 Minn. 194; *Webb v. Faridge*, 55 Iowa 11; *Annoda Prasad v. Dwarka Nath*, *supra*.

5. *Finch v. Burden*, 12 L. T. 802.

6. 10 L. T. 548.

by the plaintiffs and sent back to the chief factory at B to be examined who again examined it and rejected the exception and passed the account, the plaintiffs, however, persisted on their claim for account which the defendants objected to answer on the ground that the accounts had been settled, it was held that nothing could discharge the defendants but a release or discharge from the plaintiffs since otherwise their agents by mutual connivance might ruin the principals.¹ Where, however, a merchant did not take exception to an account sent to him and kept his account current for two years without objection it was considered as a stated account.²

Although accounts rendered and not objected to are not of necessity to be considered as settled in every case, yet they will be so treated where they have been entered in the books of persons to whom they were rendered and balances shown upon them have been paid.³ In *Farquhar v. East India Co.*,⁴ plaintiff was the commercial agent of the East India Co., at Amboyna. It was his duty to send his account to J the Company's agent at Banda to examine and transmit to the Governor of Madras. On plaintiff's accounts there appeared a balance of 1,325 dollars against him, but on reference to account kepts by J, of the same transactions instead of a deficiency, 4,771 dollars appeared due to plaintiff. The company then allowed the 1,325 dollars only. It was held that this was not a sufficient recognition of the correctness of J's accounts so as to entitle the plaintiff without further evidence to the 4,771 dollars. But where a Calcutta firm and its English agent agreed to strike a balance in respect of disputed accounts, reserving one considerable item for future investigation it was held that the transaction amounted to an adjustment of account and it could not be re-opened in the absence of fraud.⁵ An agent cannot take advantage of his own omission to keep account nor he can plead in defence to a suit for account that he rendered to plaintiffs a reasonable account. That which amounts to a plea of *plene conpouterit* must be rendering an account to plaintiff's satisfaction or an account which shows an agreed balance between plaintiff and defendants. Where, however, the course of dealing is inconsistent with keeping accounts, as, for example, where the principal engages an agent, who is not sufficiently literate, to keep account or where dealings between him and his employer are inconsistent with his keeping regular account, the agent undertaking no duty to keep accounts, a suit for account is not maintainable.

While rendering account an agent is bound only to show such entries in his account books as relate to the transactions concerning the principal. So *a fortiori* a principal's claim to account based on the non-production of the entries which do not concern him is not maintainable.

1. *East India Co., v. Munston*, 22 E. R. 918. See also *A. G. v. Lindergren*, 146 E. R. 84.
2. *Ticket v. Short*, 28 E. R. 154.
3. *Hunter v. Belcher*, 10 L. T. 548.
4. 8 Beav. 280.
5. *Mc Kellar v. Wallace*, 8 Mon P. C. 378

Under ordinary circumstances the amount due from the agent, may be determined by the ordinary methods of examining accounts and computing amounts as are employed in other cases. It is entirely possible, however, for the parties to agree that the amount due shall be determined in a specified manner or by a particular person and unless impeached on the ground of mistake or fraud such determination would ordinarily be conclusive.¹

Where an insurance agent agreed that the actual condition of his accounts with the company should be ascertained and determined by an inspection of his reports made by any person authorised by the company, to make it, gave to such person full power to compute the sum due to the company, as it appeared from such inspection and agreed to ratify his computations waiving the production of any evidence other than such report and account, it was held that in the absence of fraud or mistake the report of such person was conclusive.¹ Where, however, on a dispute arising between the principal and his agent who acted as steward, professional adviser and general confidential agent, an agreement was entered into between the agent and a clergyman acting on behalf of the principal whereby a gross sum was to be paid to the agent in lieu of his claims, but no account bill or vouchers were rendered or produced by the agent, nor was any bill of costs delivered, it was held that the agreement did not protect the agent from rendering an account to his principal.³ So, where in a suit for recovery of money from the defendant it is found that the plaintiff had, after a settlement of accounts, admitted his liability to pay the defendant a certain sum of money, it was held that as there was no settlement by compromise by the authorities but only an ascertainment of the real balance upon an examination of the accounts, the plaintiff was not barred from showing that there were errors in the account, but in view of the admission of the plaintiff, the onus lay on him to show that the accounts were not properly examined.⁴ If, however, the parties meet and agree not to ascertain the exact balance, but agree to take a gross sum as the balance, a sum which one is willing to pay and the other is content to receive as the result of these accounts, it is obvious that the production of vouchers is entirely out of question, and errors in the accounts are so also, for the very object of the parties is to avoid the necessity for producing those vouchers upon the assumption that there are or may be errors in the accounts so settled; therefore it is either an account stated and settled in the formal sense of that expression, or it is the case of a settlement by compromise.⁵ So, where plaintiff, on his own free will and accord and without any fraud or undue negligence exercised by the defendant, waived his right to an examination of accounts for the purpose of ascertaining the balance due and

1 *Khazanchand v. Committee of the Notified Area Sangla Hills*, 46 I C 545, *metropolitan Life Ins. Co. v. Long*, 65 Ill App. 295, But see *Jenkins v. Gould*, 38 E. R. 620.

2 *Metropolitan Life Ins. Co. v. Long*, 65 Ill App 295.

3 *Jenkins v. Gould*, 38 E R. 620.

4 *Khazan Chand v. Sangla Hill Notified area*, 46 I C 545—1919 P L R. 62.

5 *Mc Kellar v. Wallace*, 5 Moo. I. A 372 (1895) P. C.

agreed to treat a gross sum of Rs. 3,956/- as due from him and accordingly executed a promissory note for that amount, it was held the promissory note must be treated either as the result of a settled account or as a settlement by compromise.¹

It will be observed that the requisites for making account depend upon the circumstances of each case and the mode of dealing between the parties,² and no hard and fast rules can be laid down which may be sufficient to apply to every case, the decision in such cases depending on its own merits. The principles stated above may, however, help an equitable determination of the question where it arises.

Where at the creation of an agency the time of accounting is expressly agreed upon or where from the circumstances of the case, an agreement to account at a particular time is to be implied, such agreement will, as a matter of course, govern the question. In the absence of such an express or implied agreement the time when accounting should be made will depend largely upon the facts of each case. It may be stated as a general rule that an agent is bound to account upon demand and in all events within a reasonable time.³ A manager is bound to account to his employer whenever he is called upon to do so under reasonable circumstances. An agent who is bound to render accounts at the end of a year is not absolved from liability from acts committed in the course of that year, and even if he is dismissed before the time arrives for the rendering of account, he would have to render good any misappropriation and in doing so the court would call upon him to render an account to ascertain what they were.⁴ So an agent who has received goods of his principal for sale must account for the proceeds within a reasonable time and even without demand in cases where a demand would be impracticable or extremely inconvenient. Thus, factors abroad or at distance from the place where the principal resides, who received goods for sale without special instructions as to the mode of remittance are bound to render account of their sales and pay all the proceeds thereof within a reasonable time according to the course of the business and if they neglect to do so they may be sued for damages for the negligence as well as for the rendition of account.⁵ An agent who is engaged to make collection is bound to give notice of his realisations to his principal within a reasonable time⁶ and remit them to him if he receives no directions as to their disposition within a reasonable time.⁷ Where, however, he is acting for a foreign principal, he is not bound to take a risk of the remittance by methods of his own

Time for
rendering
account

1. *Manghiram v. Lazminarayan*, 32 Bom 353.

2. *Moheshchandra v. Radha Kishore*, 12 C W. N. 28 citing L. R. 2 H. L. 1, 5 Moo. L. A. 373, 8 Moo. P. C. 378.

3. *Mechem*, S. 1336; See also *Lawless v. Calcutta Landing & Shipping Co.*, 7 Cal. 627.

4. *Sankaram v. Vatakkimurthi*, 1925 Mad. 891.

5. *Coton v. Walton*, 32 N. H. 352; *Clark v. Moody* 17 Mass. 145.

6. See *Katir*, pp. 586, 587 and the American authorities cited therein.

7. *Bedell v. Jannay*, 9 Ill. 193.

selection but having advised the principal of the collection he may await his directions as to the manner in which remittance should be made.¹ *

On determination of the agency the agent is bound to render account of and deliver to the principal or such person as he appoints therefor all the property, equipment, cash and papers, which belong to the principal and which come into his possession because of the agency.² The fact that the relation was terminated by the principal without right would ordinarily be immaterial in such cases and give the agent no valid excuse for refusing to render account.³

Mode of
taking the
account.

As already observed, an agent will not discharge himself from the duty of accounting, by merely delivering to his employer a set of written accounts, without attending to explain them, and producing vouchers by which the items of disbursement are supported; and when this is done, it is the province of the principal to point out the entries in such accounts which he alleges to be erroneous, and, in respect of transactions not shown in the account to state what monies have been received and not credited; and it then becomes the duty of the judge or officer directed to take the account in the suit in which the account has been ordered, to proceed to deal with the questions thus raised between the parties treating each item separately.⁴ If, on the other hand, no sufficient accounts have been rendered by the agent the proper and convenient mode of so doing is for the Court to fix a day before which the defendant should file a written statement of his accounts, soliciting therein all the items of receipt for which he is accountable on one side, and all items of disbursement on the other, and to fix another later day before which the plaintiff should file any objections which he may have to make to these accounts when filed; and finally the Court ought to appoint a third day upon which an inquiry into the truth and correctness of the statements of accounts filed by the defendant should be made, and on that enquiry he will take all such evidence in the way of books, and vouchers, and so on, as the defendant is entitled to produce, as well as the testimony of necessary witnesses and also all evidence on the part of the plaintiff tending to invalidate the accounts or to surcharge them; and eventually upon the determination of the inquiry, the judge should satisfy himself as to the amount which is due upon the account as established by the evidence of both parties, and frame his decree accordingly. He ought not to give a decree for alternative damages founded upon any antecedently estimated amount, which must, apart from the evidence be simply a matter of conjecture or of claim. He should give no decree other than an order on the defendant to file his accounts before the accounts have been taken, and then confine his decree to such amount as he may find to be due upon the proper taking of the accounts against the defendant; and if the defendant

1. *Ferie v. Ferie*, 10, John (N. Y.) 284 (287),.

2. See *Katlar*, p. 587 and the authorities cited therein.

3. *Ibid.*

4. *Anoda Persad Roy v. Dwarka Nath*, 6 Cal. 734.

prove contemptuous with regard to filing his statement of accounts, the Judge may proceed with the taking of accounts against him on the footing of evidence furnished by the plaintiff, and in so doing he may make all reasonable presumption against the defendant.¹ The agent when so accounting should, however, to enable him to prepare such accounts as the principal is entitled to, be allowed to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the plaintiff's possession, as may be necessary for the preparation of his accounts.² And it should be distinctly made known to the agent the specific period over which the account is required, the property or matter as to which the account is sought, and the nature of the accounts required.³

It has been held that if in a suit for rendition of accounts by the principal against the agent it is found that it is the plaintiff who owes a certain sum to the defendant it is competent to the Court to pass a decree for it in favour of the defendant against the plaintiff.⁴

It has also been held that although the procedure laid down in *Annoda Persad Roy v. Dwarka Nath* ought to be followed, yet if in a suit in the moffusil a principal prays merely that the defendant be ordered to render an account, a second suit brought by him for the recovery of the money found due by the defendant on examining the accounts will not be barred as *res judicata*.⁵ And where a defendant in a suit for a balance of an account due to the plaintiff as a commission agent denies the agency, and alleges that there is a contract of sale, the burden of proving that he has sustained losses in his capacity of agent is on the plaintiff, and his case will not be made out by uncorroborated entries in his account books.⁶ In taking an account between an agent and his principal, either party are at liberty to waive inquiry as to particular periods of time, or particular departments of expenditure; but neither are at liberty to shut out the other from inquiry otherwise; it may, however, possibly be the case that in a suit for an account, the issue between the parties is so simple, and so clearly raised and met by evidence as to be ready for decision at the time, but the general rule is the other way.⁷ In taking an account the agent is *prima facie* liable for what he had received, and is bound to discharge himself; but the evidence which is considered sufficient to discharge him, may vary as to different items, and he certainly may be entitled to all such intendments and presumptions as are made in favour of one who is called upon to render an account of transaction under circumstances which prevent

1. *Syed Shah Alatahmed v. Nushbin*, 24 W. R. 70.

2. *Annoda Prasad Roy v. Dwarka Nath*, 6 Cal. 754; See also *Dogamber Mozumdar v. Kallynath Roy*, 7 Cal. 654.

3. *Pren Nath Chukerbutty v. Benny Ameen*, 2 W. R. 250.

4. *Kahn Singh Soma Singh v. Baldev Singh*, 1942 Lah. 81=199 I. O. 695=44 P. L. R. 41.

5. *Gobind Mohun Chukerbutty v. Sherrieff*, 7 Cal. 169. See also *Syfoallah Khan v. Hapa Thakoor*, 20 W. R. 309.

6. *Jugal Kishore v. Girdhar Lal*, I L. R. All. 12, Jur. 216; *Harinath Rai v. Krishna Kumar Bakshi*, I L. R. 14 Cal. 147.

7. *Harinath Rai v. Krishna Kumar Bakshi*, I L. R. 14 Cal. 147.

any absolute bar by lapse of time.¹ The agent, however, may be freed from liability if he accounts and shows that he has expended such monies, as came to his hands for his principal's benefit and with his express authority.²

It has already been observed that the account should generally be supported by such receipts of realisations and vouchers of disbursements as are generally available in the ordinary course of the business or transactions to which such realisations or disbursements relate.³ Where, however, the account is very old and long and without any fault of the agent such receipts and vouchers or any of them are not forthcoming or were never delivered up, destroyed or lost, as often happens in the cases where settled accounts of long periods are reopened or the principal is given leave to surcharge and falsify them, courts have accepted the oath of the agent to supply their place and have passed the accounts as correct and properly rendered when so supported by agent's statement on oath.⁴ In a case of this nature where the accounts of a period of twenty-five years were ordered to be re-opened after the death of the agent the court passed a special decree for taking a general account with a direction to treat the account book as conclusive except as to items challenged within six weeks, with liberty to surcharge and falsify.⁵ In India the provisions covering the principles underlying these decisions have been incorporated in the Code of Civil procedure, 1908, Order XX, Rule 17, which runs thus:-

"The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that on taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matter therein contained with liberty to the parties interested to take such objections thereto as they may be advised".⁶ These provisions are very salutary as it is altogether impossible to lay down any hard and fast rule which may meet all cases and unless the court trying a case is given a discretion in such matter there is always an apprehension of the failure of justice. But the discretion here as well as elsewhere is to be exercised judicially and the principle laid down above may serve as a guide to exercise it in such manner as it may not prejudice either party. In the absence of a contract to the contrary neither the principal nor the agent is at liberty to claim any particular item which forms part of the account standing between them without an examination and settlement of the whole account of receipts and disbursements.⁷ Although an

1. *Harinath Rai v. Krishna Kumar Baksht*, 14 Cal. 147.

2. *Fagan v. Chunder Kant Bawerjee*, 7 W. R. 452. See also as to set off *Mohina Runjan Roy Choudhry v. Nabo Coomar Misra*, 18 W. R. 339.

3. *Annoda Prasad v. Dwarkanath*, 6 Cal. 754.

4. See *Morgan v. Lewis*, 4 Dow. 29.

5. *Stainton v. Carron Co.*, 42 Beav. 346.

6. These provisions were incorporated for the first time in the Code of Civil procedure, 1908. Before that time to make the account book admissible as *prima facie* evidence special leave of the court was necessary.

7. *Godha Ram v. Jahar Mal*, 40 Cal. 335.

agent is bound to render accounts to his principal of all his dealings in the various transactions carried on by him as agent on behalf of the principal, yet unless there is a special contract in that behalf, the principal is not entitled to select capriciously a single transaction and obtain the fruits thereof without an adjustment of the rights and liabilities of the parties in relation to all those transactions.¹

Generally the duty of an agent to render proper account is discharged when the accounts are settled and he cannot be compelled to render them again and again at the mere whim and caprice of the principal.² Where, however, there has been on the part of the agent any fraud or imposition, or there has been some important error, the whole account, though settled, may be re-opened.³ The principal can show that particular item or items of realisations are not entered in the account or that particular entry or entries in such account are false.⁴ Where the plaintiff alleged an open account and in general terms falsification, and the defendant pleaded an account stated and required a specific statement of falsification which the plaintiff refused to give, the court although holding that the account was settled and that the defendant was entitled to a verdict, yet allowed the plaintiff to amend by stating instances of falsification.⁵ It has been held that although where there are only mistakes and omissions in a stated account, the party objecting will be allowed no more than to surcharge and falsify, yet if it is apparent to the Court, that there has been fraud and imposition, the whole account will be re-opened, notwithstanding that the account was of 23 years standing,⁶ and this even where the fraud is discovered after the amount is balanced.⁷

Re-opening
of settled
accounts
when allowed.

But generally unless fraud or undue influence is alleged and proved against the agent,⁸ the courts are reluctant to re-open an account,⁹ even if the accounts are wrong and the balance has not been struck.¹⁰ This reluctance increases rapidly with the lapse of time.¹¹ A party who has once admitted an account delivered to be correct cannot afterwards file a bill to have the account taken in equity upon the mere allegation that he had no means of ascertaining that the account so delivered was correct, without charging specific acts of fraud against the defendant, and it is not necessarily an allegation against the defendant, and it is not necessarily an allegation of fraud to say

1. *Godha Ram v. Jahar Mal*, 40 Cal. 335.

2. *Mc Kellar v. Wallace*, 5 Moo. L. A. 372 (395) P. C.

3. *Moseley v. Coote*, 47 J. Ch. 271; *Clarke v. Tipping*, 9 Beav. 284; *Hunter v. Belcher*, 10 L. T. 548.

4. *Bhagwan Baksh Singh v. Joshi Damodar Ji*, 12 All. 280; *Puran Mal v. Ford Mr. Donald*, 41 All. 635.

5. *Moseley v. Coote*, 47 L. J. Ch. 271.

6. *Vernon v. Vernon*, 2 Atk., 119. See also *Clarke v. Tipping*, 9 Beav. 284; *Moseley v. Coote*, 47 L. J. Ch. 271. And *Chambers v. Goldwin*, 5 Ves. 637.

7. *Vagliano Bros. v. Bank of England*, L. R. 22, Q. B. D. 103.

8. *Kalanand v. Sri Prasad*, 17 C. W. N. 1060; *Mc Kellar v. Wallace*, supra; *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Mangniram v. Lazminarayna*, 32 Bom. 353; As to what amounts to undue influence in such cases see *Watson v. Rodwell*, 11 Ch. D. 150, *Ward v. Sharp*, 63 L. J. Ch. 513; *Chesse v. Keen*, (1904) 15 Ch. 246.

9. *Chappedelaine v. Dechenaux*, 2 L. Ed. 629; *Kilpatrick v. Henson*, 61 Ala. 464; see *Katlar*, p. 560.

10. *Gokul Krishna v. Shahai Mukhi*, 15 Cal. L. J. 204.

11. *Chappedelaine v. Dechenaux*, supra.

that the accounting party agreed to deliver up certain chattel demanded by the other upon condition of having the alleged balance admitted and paid.¹ But as direct evidence of fraud or undue influence is not always possible and often very difficult to produce and as the relation of agent to his principal is of a fiduciary character which affords greater opportunities for such conduct an important error may serve as evidence that the settlement was not arrived at voluntarily and with full knowledge of facts. For this reason courts have re-opened settled accounts in the cases of principal and agent even on the showing of a single fraudulent error.² Where accounts are impeached, and it is shown that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be opened and will not merely give liberty to surcharge and falsify; and supposing a fiduciary relation to exist between the parties, the Court will make a similar order if such accounts are shewn to contain a less number of errors, or if they contain any fraudulent entries. When the account is between persons in a fiduciary relation and the person who occupies the position of accounting party that is the trustee or agent is the defendant, it is easier to open the account than it is in the cases where persons do not occupy that position that is to say that a less amount of error will justify the court in reopening the account".³ So, where there is a single important error alleged and proved it is sufficient to entitle the court to open the account, if it thinks fit to do so either by opening it altogether or by surcharging and falsifying it. The court sees from the nature and the amount of the error that the accounts would not have been properly taken and, therefore, that they cannot stand.⁴ It is not necessary for this purpose to establish more than one error, it being in the view of the court a reasonable inference that if there be one mistake there may be many mistakes, and the opposite party, therefore, ought to have the liberty of entering fully into those accounts with a view to prove other mistakes.⁵ Where a single item complained of is a fraudulent item, the proper order to make is to open the accounts altogether, but where the item complained of is not a fraudulent item, and the accounts are of some years standing the proper order is only to give leave to the principal to surcharge and falsify.⁶

A settled account, however, cannot be re-opened without specifically charging at least one definite and important error and supporting it with evidence confirming it.⁷ So where an account has been settled up to a certain date, it lies on the

1. *Daithes v. Lee and Lama*, 5 L. J. Eq. 73.

2. *Puran Mal v. Ford & Macdonald Co.*, 41 All. 685.

3. *Per Lord Jessel M. R. in Williamson v. Barbour*, 9 Ch. D. 529; *Ramaswami v. Guzmanamont*, (1917) M. W. N. 121; *Rahim v. Law & Co.*, 1925 Rang. 210.

4. *Per Lord Jessel M. R. in Gething v. Keighley*, 9 Ch. D. 547; *per Lord Leach in v. Davies Spurling*, 1 Taunt. 199.

5. *Rahim v. Law & Co.*, 1925 Rang. 210.

6. See citations in f. n. (4) above. See also *Allfrey v. Allfrey*, 30 Jur. 269 *Lawless v. Mansfield*, 1 D. & W. 557.

7. *Padam Raj v. Gopi Kissan*, 56 L. C. 129.

party who wants to re-open that account to aver some specific error in the account and prove it.¹

Thus, a suit by principal for accounts, on the allegation that the defendant, his agent, has not rendered any account, has entirely different scope from that of a suit in which the principal alleges that the defendant, his agent, has rendered accounts but prays to have them re-opened or to have liberty to surcharge and falsify them on the ground of fraud or material error. In the first class of cases, if it is established that the defendant is the agent of the plaintiff and has not rendered accounts, a preliminary decree must follow as a matter of course.² In the second class of cases, parties having accounts between them may meet and agree to settle those accounts by the ascertainment of the exact balance and if it afterwards turns out that there are errors in the account it is a sufficient ground for re-opening the account and for setting it right in a Court of Equity.³ It is only in the case of settled accounts that liberty has to be obtained by a plaintiff to surcharge and falsify.⁴ But if a settled account is impeached for error, particular errors must be stated and proved and the same rule holds even where the account is settled 'errors excepted',⁵ so as to enable the defendant to controvert the charges and allow the Court to judge whether the plaintiff ought to be allowed to surcharge and falsify.⁶ Where an item has by the common mistake of both parties been omitted from the accounts, either the whole account may be re-opened or leave may be given to surcharge and falsify.⁷ If there are errors of account, of sufficient number and sufficient magnitude, it is not necessary that the errors shown amount to fraud; if they are sufficient in number and importance, whether they were caused by mistake or by fraud, the Court has a right to open the account. The principle becomes stronger when the parties stand in confidential relation as the Court will open upon much slighter grounds.⁸

It has been held that it is only on the specific allegations of fraud or mistake that a suit for re-opening a settled account is maintainable.⁹ Where the plaintiff seeks to re-open settled accounts on the ground of fraud, such fraud must be specifically alleged in the plaint and proved in the evidence. Where there is no averment and proof of fraud or undue influence or of substantial error warranting an inference that the account was not settled with a free-will and with full knowledge of all the facts, the court is not justified in re-opening a settled account.¹⁰ If fiduciary relations have been established between the parties,

1. *Ebrahim Ahmed v. Abdul Hag*, 27 I. C. 879; *Bahim v. Law & Co.*, supra.

2. *Prasanna Kumar v. Burn & Co.*, 13 Cal. L. J. 165.

3. *Baney Madhub, v. Subal Chander*, 11 C. W. N. 776, 781.

4. *Bharat Chandra v. Kisan Chandra*, 1925 Cal. 1069=52 Cal. 766=20 I. C. 944.

5. *Mohesh Chandra v. Radha Kishen*, 12 C. W. N. 28. See also *Prasanna v. Burn & Co.*, 13 Cal. L. J. 165, 176.

6. *Prasanna Kumar v. Burn & Co.*, 13 Cal. L. J. 165.

7. *Baney Madhub, v. Sukal Chunder*, 11 C. W. N. 776, 781.

8. *Rothchild v. Brookman*, (1831) 5 Bligh N. S. 662; ref. to in *Prasanna Kumar v. Burn & Co.*, 13 Cal. L. J. 165.

9. *Radha Kishen v. Terath Ram*, 1 L. L. J. 225; *Mac Kintosh v. Temple*, Ind. Jur. N. S. 333.

10. See Bowstead, Art. 54, p. 110.

a court will not re-open accounts which have long been settled between the parties, unless the plaintiff can show definitely at least one fraudulent omission or insertion in the accounts.¹

Cases in which persons meet and agree not to ascertain the exact balance but to take a gross sum as the balance, a sum which one is willing to pay and the other is content to receive as a result of those accounts should also be distinguished. In such cases, ordinarily speaking, accounts will not be re-opened unless vitiated by fraud.² Although a person is always entitled to prove if he can that there was a mistake in the accounts and that he signed them as correct by mistake³ yet if without any fraud practiced or undue influence exerted on him by the other party he, out of his own free-will, waives his right to an examination of accounts for the purpose of ascertaining the balance due and agrees that a gross sum is due from him and executes a pro-note for the amount the promissory note must be treated either as the result of a settled account or as settlement compromise and in either case he cannot impeach it and claim a re-opening of the account.⁴ It is not necessary for the conclusiveness of an account that it should be finally closed,⁵ but an express or implied approval of the statement or the facts which warrant an inference that the principal has acquiesced in it are sufficient to prevent him from claiming a re-opening. So a principal who with his eyes open pays an overcharge cannot be heard to object later after the accounts have been settled.⁶

It is to be observed that the rule against re-opening of settled accounts except on the ground of fraud or undue influence is limited in its application only as between a principal and an agent, but not as between a principal and the agent's representatives and sureties.⁷ The auditing of a Company's accounts does not preclude the company from calling upon its agent for rendition.⁸

Time from
which acc-
ount should
be re-opened

When the agent has been guilty of fraud, or the accounts have been settled under undue influence, his account will be re-opened from the commencement of the agency, and in such a case lapse of time does not constitute a defence.⁹ Proof of one fraudulent error or overcharge has been held sufficient to entitle the principal to have the agent's accounts re-opened for a period of twenty years.¹⁰ Where there were incorrect entries, and amounts unexplained and unaccounted for in the accounts of a deceased agent of a company, who was also a large share-holder,

1. *Puran Mai v Ford Macdonald & Co.*, 41 All. 635 following *Williamson v. Barbour*, (1877) L. R. 9 Ch. D. 529, *Boo Jinaiboo v. Sha Nagar*, 11 Bom. 78.

2. *Hancy Madhub v. Subal Chunder*, 11 C. W. N. 776, 781.

3. *Bhojraj (Seth) v. Shanker Nath (Panda)*.

4. *Mangniram v. Laxminarayan*, 32 Bom 358

5. *Me Kellar v. Wallace*, 5 Moo. I. A. 372 (395) P. C., *Gokul Krishna v. Shashi Mukhi*, 15 Cal. L. J. 204.

6. *Rahim v. Law & Co.*, 1925 Rang. 210.

7. *Kalanand v. Sri Praend*, 17 C. W. N. 1060.

8. *Ram Chand v. Imperial Soap, Oil & General Mills Co.*, 42 I. C. 375=86 P. R. 1917.

9. *Bowstead*, Art. 54, p. 110

10. *Williamson v. Barbour*, 9 Ch. D. 529. See also *Rahim v. Law & Co.*, 1925 Rang. 210.

his accounts were re-opened after his death for a period of twenty-five years.¹

As already observed, even where the error discovered is not fraudulent the court may give leave to the principal to surcharge and falsify the whole account or such portion thereof as it thinks proper.² Courts in such cases are generally guided by the importance of the error or errors alleged and proved by the principal and by the strength or weakness of the presumption which the proof of such error or errors raises as to the incorrectness or otherwise of the accounts or such portion thereof as contains such error or errors. They generally, instead of giving the principal leave to surcharge and falsify, order a re-opening of a settled account although extending over a great number of years and closed for a long time where errors to a considerable extent in amount and number of items are shown to exist³ and where the relations between the parties are of a fiduciary character.³ The standard here laid down varies inversely with the confidence reposed in the opposite party, i. e., a less amount of errors may suffice for the Court to take this course where the confidence reposed is very great.³

It is to be noted that the difference between the Court's order to re-open the settled account and that giving leave to the principal to surcharge and falsify such account is only a difference of procedure in which the accounts between the parties will be resettled. Where the Court orders the re-opening of the account the procedure to be followed will be identically the same as in a case where a decree for the rendition of account is made. The defendant by a preliminary decree will be ordered to file an account within a time specified in the decree and then the plaintiff will be given an opportunity to examine such account and file his objection if any, within the time fixed in the decree for that purpose and the court will then either itself proceed to decide such objections or may appoint a commissioner to decide them and submit a statement to the Court, and on findings of the court in the latter case on the commissioner's statement after determination of any objection to such statement filed by either party, will form the basis of the final decree.⁴ But where the Court gives leave to the principal to surcharge and falsify the account the procedure will be just the reverse of what has been laid down above. In such case the presumptions raised by the settlement of account being not altogether destroyed but only a reasonable suspicion being created by the discovery of the error as regards the correctness of the account, it is the principal who is ordered by a preliminary decree to file a statement of such errors and overcharges as he may find in the agent's account after an examination of his account books. The agent is then given an opport-

Difference between the re-opening of the account and giving the principal leave to surcharge and falsify the account.

1. *Stainton v. Carron Co.*, 27 L. J. Ch. 89.

2. See per Jessel M. R. in *Gething v. Keighley*, 9 Ch. D. 547; per Lord Cottenham in *Allfrey v. Allfrey* 30 Jar. 269.

3. *Williamson v. Barbour*, 9 Ch D. 529.

4. *Syud Shah Aliahmed v. Mst. Hibe Nuzibun*, 24 W. R. 70; *Annada Perna v. Dwarakanath*, 6 Cal. 754; 8 Cal. L. R. 321; *Degumbur Mesomdar v. Kalinath Ray*, 9 Cal. L. R. 268; *Hurranath Roy Bahadur, v. Krishna Coomar Buhaki*, L. R. 13 I. A. 123; *Potamder Dutt v. Hurish Chunder*, 15 W. R. 200; *Hurranath Rai v. Krishna Kumar*, 14 Cal. 147; *Thirukumaresan v. Subbaraya*, 20 Mad. 813.

unity to show that the statement filed is not correct either wholly or as regards some particular items. The court then proceeds to determine the issues thus raised and to pass a final decree on its findings on such issues.¹ By a preliminary decree in such cases the principal is given only an opportunity for a re-examination of the whole account and to find out errors therein and the court by its final decree only rectifies such errors and omissions and awards to the principal a sum which may be found due as the result of such rectification.²

By preliminary decree ordering the agent to render account, it is the agent who has to file a statement of account prepared from the books of account if any in the first instance, and the burden of explaining and proving every item is in the first instance on him.³ Unless the errors and omissions proved by the principal smack of fraud or undue influence being exercised by the agent in arriving at the settlement pleaded by him, courts are generally reluctant to re-open the settled account but order only leave to the principal to surcharge and falsify.⁴ But for an order giving leave to the principal to surcharge and falsify the account it is not necessary that the error or omission alleged and proved by the principal should also be proved to be fraudulent.

Although the distinction noted above as regards the Procedure, in the cases where the court orders the re-opening of the account and those where it only gives leave to the principal to surcharge and falsify, is not observed in the Code of Civil procedure, 1908, the court by Order XX, Rules 16 and 17 being given full powers to give, either by the preliminary decree directing the accounts to be taken or by any subsequent order, special direction with regard to the mode in which the account is to be taken or vouched, and although no provision is made in the code as regards procedure to be followed in the cases where a re-opening of the settled account or liberty to surcharge and falsify them is claimed by the principal the cases cited here seem to be still good law in India and are the only proper guide for the courts for a judicial exercise of the power of discretion given by Order XX, Rule 17.⁵

Who can
claim acc-
ounts

Under Section 213 of the Indian Contract Act, an agent is under a statutory obligation to render account to his principal but not *vice versa*. The principal owes no obligation to render accounts to the agent. Therefore a suit for accounts by an agent against the principal does not lie.⁶ The mere fact that the principal has kept accounts does not entitle the agent to ask for accounts,⁷ but he can sue the principal for the balance due on accounts.⁸

1. *Davies v. Spurling*, 1 Taunt, 199.

2. *Rahim v. Law & Co.*, 1925, Rang 210.

3. *Ibid* See also *Annoad Persad v. Dwarkanath*, 6 Cal 754, *Therukumarasam v. Sukharaya*, 20 Mad. 313.

4. *Rahim v. Law & Co.*, 1925 Rang 210.

5. See *Katlar*, pp. 585, 586.

6. *Narmada Charan v. Maheraj Bahadur*, 41, C W. N. 703=1937 Cal 359; suit by pleader against his client.

7. *Ghulam Qutubuddin v. Fais Baksh*, 1925 Lah. 100=104 I. C. 959.

8. *Gopikrishna v. Padmanab*, 37 L C 510 (N); *Hannuman v. Balmukund*, 1927 Lah. 701=104 I C 239.

Where a principal sues his agent for account and it is found, on taking accounts, that sums are due to the agent from the principal, a decree cannot be passed in favour of the agent, if the agent did not specially pray for a decree.¹ There is in this respect, a clear distinction between such suits and a suit of a partner against his co-partner for rendition of accounts or by a co-sharer for partition of joint property in which cases the defendants are entitled to institute similar suit against the plaintiff and have the same interest in the suit as the plaintiff, and a decree can, therefore, be passed in their favour against the plaintiff.² In *Bhawani Sahai v. Chhajju Mal*,³ however, it has been held that in a suit by a principal against his agent for rendition of accounts, it is competent for the Court at the time of passing a final decree to pass a decree in favour of the agent upon the finding that money was in fact due to the agent from the principal and such a decree is justified under Or. 20, r 16 C. P. C. In this case the defendants mentioned a specific amount as being due to them though they did not specifically claim any set off under O. 8, r.6, C. P. C.

But though an agent is not ordinarily entitled to claim an account against the principal,⁴ an agent is entitled to call for accounts from his principal in special circumstances or under trade usage or a definite contract. Thus insurance agents to be remunerated by a commission calculated on the premia paid on all policies effected or introduced through them cannot know which of these policies have lapsed, matured or been forfeited and they are entitled to call on their principals, i. e. , the insurance companies for rendition of accounts⁵

An agent has the duty to render accounts to the principal and not to any other person though the latter may be ultimately entitled to the subject matter of the agency.⁶ But a reversioner has been held to be entitled to an account from an agent appointed by the widow for moneys not paid to her⁷

The agent is not bound to account separately to one of several co-principals and if he has done so he is not thereby discharged from liability to the other or others unless the co-principals are also partners.⁸ Where the monies are received on behalf of joint principals, the agent is liable to account to them jointly, and is not discharged by payment to one or more of them only, unless by authority of all⁹ In the case of an agent making joint collections on behalf of several co-sharers, every one of them is entitled to a copy of the joint accounts.¹⁰ On the

1. *Parmanand v Jagat Narain*, 32 All. 525

2. See also *Lachmi Narayan v Balmukand*, 51 I A 321=1924 P. C. 198=4 Pat. 61; *Bhatu v Fagal*, 1926 Pat. 141=5 Pat. 223, *Tukaram v Ramchandru*, 1925 Bom. 423=49 Bom. 472; *Deitchand v Parbhu Lal*, 1926 All. 582=36 I. C. 57.

3. 1937 All. 276=168 I. C. 938

4. *Keshu Ram v Joti Sarup*, 1932 Lah. 619=140 I. C. 15

5. *Ram Lal v. Asian Am. Co.*, 1933 Lah. 483=144 I. C. 506; *Calcutta v India Equitable Ins. Co.*, 1937 Sind 51=167 I. C. 929.

6. *Chidambaram v. Pichappa*, 30 Mad. 243.

7. *Stridhar v. Kalipada*, 16 C. W. N. 106.

8. *Halsbury*, Vol. I, 2nd Edn., Art. 506, p. 210. *Raghubar v. Firm Pate Lal* 1933 Lah. 96=146 I. C. 178.

9. *Halsbury*, Ibid, Art. 421, pp. 247, 248; *Jagdeep v. Mri. Rajs Koor*, 1923 Pat. 464=3 Pat. 585=75 I. C. 1022.

10. *Digambar v. Kali Nath*, 7 Cal. 554, 556.

other hand, where an agent has to account to more principals than one, they must all sue and he is not liable to render separate accounts in separate suits to each of his principals to whom jointly he is accountable.¹

Rights and liabilities of successors and representatives of the parties relating to accounts.

As will be noticed hereafter, death or bankruptcy of a party generally results in the termination of the relation unless the case falls within any of the exceptions noted in the subsequent Chapter. But the ceasing of such relation does not result necessarily in the total ceasing of the rights and liabilities of the party surviving although the nature of the claim may be altered to meet the new situation thus created. The maxim *actio personalis moritur cum persona*, applies only to the claims which are of a purely personal character and does not extend to claims in which rights to property are involved.² A claim of a principal to demand account is not a claim of a purely personal character but always involves a right to some property. So is also the case with the agent's liability to render account to his principal. Hence it has been held under the English law that an agent is bound to render account to the successors of the principal and neither the death³ nor the bankruptcy⁴ of the principal results in the discharge of his liability. If the principal ceases to hold the office by virtue of which he had employed the agent, the right to demand account survives to his successors in office.⁵

In the case of an agent dying without rendering account the authorities do not seem to be unanimous as to the form which the action should take, although they are agreed as to the liability of the agent's successors to recoup the principal to the extent of the deceased's liability out of the assets left by the deceased. It has been held that the legal representatives cannot be called upon to render accounts to the principal in the same sense as the agent himself as they cannot be required to explain matters of which they have no personal knowledge and to assist the principal in the investigation of the management of his estate of which they are ignorant. But it does not follow that the estate of an agent who has not rendered an account escapes all liability in the hands of the representatives. The remedy of the principal in a case of this description is to sue the representatives for any loss he may have suffered by reason of the negligence or misconduct, the misfeasance or malfeasance of his agent; in other words, the suit is not one for accounts strictly so called but a suit for money payable to the principal by the representatives of the agent out of the assets in their hands.⁶ A suit for rendition of account is,

1. *Kadir Bakhsa v. Reichmann*, 82 I. C. 766 Cal.

2. Underhill Reports, pp. 82-84; *Haichawi v. Maz.*, 18 Q. B. D. 771 See Katiar, p. 589.

3. *Stanton v. Carron Co.*, 42 Beav. 846.

4. See Section 48, sub-section (6) of the English Bankruptcy Act 1914 (4 & 5 Geo. 5, C. 59); Katiar, p. 589.

5. *Seller v. Griffey*, 83 Beav. 542.

6. *Kumuda v. Asutosh*, 17 C. W. N. 5; *Godhanram v. Joharmall*, 40 Cal. 335=17 C. W. N. 47=18 I. C. 583; *Rameshwar v. Narendra*, 1935 Pat. 289=71 I. C. 916; *Pran Das v. Charan Das*, 1939 Lab. 362=117 I. C. 235, see especially for burden of proof, see also *Badrinath Upadhyay v. Kesho Kumar*, A. I. B. 1940 Pat. 114=184 I. C. 496.

therefore, not maintainable according to these cases against the successors of a deceased agent, but the court may allow an amendment of the plaint to convert it into a suit for recovery of money misappropriated by the deceased and for recovery of damages for the loss sustained by the principal by reason of the agent's negligence and misconduct.¹ The view of the Calcutta High Court was adopted by the Patna High Court also where the Court observed: "It is, we think, well established that the representatives of a deceased agent are not liable to render an account in the case in which the agent, had he lived, might have been called upon to do so . . . The liability to render account is a principal one attaching to the agent and cannot be enforced against his heirs. This does not mean, however, that the heirs must necessarily escape liability altogether for the defalcation or breach of duty of the agent, if the principal can prove that he has suffered loss thereby".² It has also been held that if the agent collected money belonging to the plaintiff which he ought to have made over to the plaintiff and failed to do so and died while such money was still due to the plaintiff, the agent's representatives are not free from liability.³ In any case, where an agent dies pending the account suit, it may be continued against his legal representatives.⁴ So where a suit was instituted by a principal against the agent for an account and for recovery of moneys to be found due on taking accounts, but the agent died pending the suit which was continued against the sons as his legal representatives, *held*, that the sons were liable not only for money proved to have been actually received by their father and not duly accounted for but also for money which he negligently failed to collect.⁵ In an old case it was held that on the death of a manager a fresh right to an account accrues to the employer as against the manager's representatives,⁶ and a suit for money due on an account and a suit for an account are really one and the same thing.⁷

In England in an action against the representatives of a confidential agent who had never been called upon to account by his employer, it was held that an action of account did not lie, but the employer could show that moneys had been received by such agent and not accounted for or that such agent had appropriated to his own purposes his employer's money. His remedy should have been debt for ascertained defalcation or *assumpsit* on the agent's implied promise for damages to that amount on such breach of duty.⁸

Accounting
in case of
joint principals.

Carefully considered the difference in the two views is material only in the sense that it affects the question of burden

1 See *Kumuda Charan v. Asutosh*, and *Rameshwar v. Narendra*, *supra*.

2 *Rameshwar Singh v. Narendra Nath*, 1923 Pat 259.

3 *Rajs Sai Sekharsenar v. Hayirannassa*, 28 Cal. L. J. 492; *Kumuda v. Asutosh*, 17 C. W. N. 5.

4 *Maharaja Bahadur v. Basanta*, 17 C. W. N. 593=18 L. C. 876.

5 *Venkatacharijulu v. Mohana Pandu*, 44 Mad. 214=61 L. C. 530.

6 *Lodoss v. Calcutta Landing and Shipping Co.*, 7 Cal. 627.

7 *Jhapa Jannassa v. Bama Sundary*, 14 C. W. N. 1042.

8 *Erwallinger v. Augustus*, 4 L. T. (O. S.) 189.

of proof and limitation.¹ It has been held that the onus will be on the plaintiff to prove each item in the sum which he claims, that is, to prove that each item was actually realised by the agent and further it was not paid to his credit. The representatives of the agent will be at liberty to adduce such evidence as they please to show either that the money was not realised by the agent or that after realisation it was paid to the plaintiff. The amount actually due will be ascertained and the Court will pass a decree against the assets of the deceased agent in the hands of the representative, that is to say, if any sum is found due to the plaintiff.²

What the
accounts
should in-
clude.

As has already been noted, the agent is bound to account for every kind of property and funds which have come into his possession in his capacity as agent of the principal, whether lawfully or unlawfully or by virtue of a fraudulent or secret dealing in the business of the agency by the agent on his own behalf without the knowledge and consent of the principal.³ The illegality of a transaction entered into by an agent, as has been already pointed out,⁴ is not a bar to an action by the principal for an account thereof,⁵ unless the contract of agency is itself unlawful.⁶ In England where accounts are generally taken in a court of equity, damages for neglect of duty cannot be assessed in taking an account the proper remedy for such damages being an action at law.⁷ But as the courts in India are empowered to administer law and equity both in the same action there appears to be no bar for the inclusion of such claim here in an account suit.⁸ The agent is entitled to credit to himself in such accounts every item of charges which he can legally claim against the principal. They include all moneys due to him in respect of advances made or expenses properly incurred by him in conducting the business of the agency, and also such remuneration as may be payable to him for acting as agent.⁹ As to what such charges are see Chapter X.

How far
agent bound
by his own
accounts.

As a general principle of law it may be stated that accounts rendered by an agent to his principal and approved by him are generally conclusive not only against the principal but still more against the agent and cannot be lightly re-opened.¹⁰ The agent has no right to surcharge and falsify them.¹¹ If an agent credits his principal for money received, it will be concluded that it has been received until the contrary shall be

1. See *Katjar*, p. 591.

2. *Raja Rani Ekharanwar v. Hasirannessa*, 26 Cal. L. J. 492.

3. See notes on Pages 382 to 382.

4. See notes on Page 375.

5. *Sharp v. Taylor* (1850), 3 ph. 6101; *Williams v. Trye* (1854), 23 L. J. Ch. 860.

6. *Knowles v. Haughton* (1805), 12 Ves. 168; *Battersby v. Smyth* (1816), 3 Madd. 119; *Sykes v. Headon*, (1879), 10 Ch. D. 171; See *Bowstead*, Art. 84, p. 110.

7. *G. W. Ins. Co., v. Cunliffe*, L. R. 3 Ch. 525.

8. *Cl. Kumuda Charan v. Asatoch*, 17 C. W. N. 8.

9. See S. 217, Indian Contract Act, 1872.

10. *Mecham*, § 1345.

11. *Mansley v. Court*, 47 L. J. Ch. 271.

proved.¹ He is bound by the account which he delivers to his principal unless he can show he had given credit for that particular payment by mistake.² An agent's account, however, in which he charges himself with sums received, is not conclusive against him as to the fact of those receipts and may be reopened to let in the fact of the sums not having been received in the following cases:-

- (1) If the account, on the face of it, discloses that the money has not been actually received,
- (2) If the principal shows by his conduct that he knows that the money has not been actually received.
- (3) If the principal does not express his dissent to a subsequent correction of the account by the agent, in which correction he relieves himself from the sum with which he had previously charged himself.³

It has been held under the American law that usually statements and accounts rendered by the agent would have no greater conclusiveness than other similar admissions, open to correction upon proof of mistake. But where the principal, in reasonable reliance upon the statement, has altered his situation in such wise that he will be prejudiced if the statement be untrue the agent may be estopped from contradicting it.⁴ A *fortiori* would this be true where the statement was made with the intention to deceive. Where a real estate agent falsely reported to his principal that he had received from a purchaser a certain deposit on the purchase price, by which statement the principal was induced to ratify the sale, the agent was bound to the principal to make good his statement.⁵ Similarly, where an agent represents to the principal that he has money in his possession belonging to the latter, but says that he will not pay it over until their conflicting claims have been adjudicated in court, and the principal, thereupon brings a suit for the recovery of the money, the agent is estopped from saying that he did not in fact have it.⁶ Similarly, where an agent to invest money has reported to his principal that he has made investments in certain mortgages, which were, however, fictitious and has paid to his principal regularly what he asserted was the income therefrom (really paid from the principal's money) until the agent's death, his estate is liable to the principal for the amount so reported as invested.⁷ So, where an agent who managed money matters and investments of the principal, rendered account charging interest on mortgage as received and representing that there were no arrears and paying balances appearing due on such accounts, he could not on the death of the principal charge his estate with interest, on the plea that it had not been actually received from the mortgagors, but had been advanced by the agent to the principal for his accommoda-

1. *Shaw v. Woodcock*, 7 B. & C. 78.

2. *Shaw v. Pictton*, 4 B. & C. 715.

3. *Shaw v. Dartnall*; 6 B. & C. 56; *Kathar*, pp. 592, 593.

4. *Mosheim*, s. 1845.

5. *Wood v. Blaney*, 107 Cal. 291 (Am.).

6. *Movers v. Byars*, 99 Ala. 184.

7. *Hartmann v. Schnugg*, 113 App. Div. (N. Y.) 354 aff'd 186 (N. Y.) 617.

tion.² He was, however, allowed to use the name of the representatives of the principal to recover what might be due from mortgagors on giving an indemnity. In *case v. Mills*,³ plaintiff, a surveyor of turnpike roads rendered annual accounts to the trustees of moneys received and also of moneys expended by him in repairs of roads for 1856, 1857, and 1858 each of which accounts, after giving credit for his yearly salary showed a balance due to himself. These accounts were received, passed and settled by the trustees in the belief that they were correct, but in point of fact plaintiff had expended more money in such repairs in each year than he had charged in such account. On rendering his account for 1859 and being challenged by the trustees as to its correctness, he acknowledged that it was incorrect and that he had laid out more money than he had charged therein and thereupon claimed payment from the trustees of the sums omitted in the accounts for the previous year, but the trustees refused to pay him either and did not pass the account for 1859. There was no actual fraud in fact contemplated by the plaintiff, who knowingly omitted the items, partly through negligence, partly to avoid complaints from the trustees and in the expectation of their being in better funds in future years. On an action by the plaintiff against the trustees, through their clerk, to recover the omitted items it was held that the plaintiff was not entitled to recover in respect of sums kept out of the accounts before 1859 on the broad principle that a man shall not be allowed to "blow hot and cold" to affirm at one time, and to deny at another, making a claim on those whom he has deluded to their disadvantage and founding that claim on the very matters of delusion but in as much as this did not apply to the account for 1859 the plaintiff was, therefore, held entitled to recover the sums really and properly expended by him in that year.

Principle of
equity in
suits for
accounts

As has already been observed, relief by rendition of account is only an equitable relief claimable by a party only in a court of equity where the jurisdictions of the courts of equity and the courts of law are distinct and separate.⁴ The courts in dealing with the question whether the plaintiff is entitled to such relief are usually guided by the principles of equity and if they find that the plaintiff's conduct itself disentitles him to such relief they always refuse it. The most important principles of equity are contained in the two maxims, namely, (1) 'one who comes to equity must come with, clear hands' and (2) 'one who seeks equity must do equity.' In fact, the so-called court's discretionary power of equity consists really in the application of these two fundamental maxims of equity. If the principal himself by his own interference or looseness of methods created or so contributed to such confusion as to render an absolutely satisfactory accounting impossible or has expressly or by implication, assured the agent or reasonably led him to believe that no formal accounts would be required, or that a particular method of accounting would be satisfactory, he cannot press

1. *Onnes v. Kirby*, 30 Bear. 31.

2. 7 H & N. 913

3. See *Mechem*, §§ 1342 and 1343; *Downs*, Art 54, p 110; *Katlar* p 595.

that the agent ought to render account according to the rigid rules and where the agent has acted in good faith he cannot complain that the agent has not kept the accounts with the strictness which might otherwise have been required.¹ So a plaintiff who has the accounts with him cannot ask a court to take the account which is in his favour while he withholds the evidence.² In *Upendra Kishore Roy v. Ram Tara* the plaintiff on attaining majority, sued his aunt who had been his guardian during his minority, for accounts with the allegation that the accounts were in the possession of the defendant which was found to be false. The court observed:—"A person who seeks equity must do equity. When an account is to be taken between parties the first necessity is that the person who has possession of the accounts should produce them and put them before the court with a succinct statement of what they contain and what the balance is, whether in his favour or against him. Until he does that it is impossible to call upon a defendant to answer a charge of misappropriating money or being liable to the estate on the accounts. It seems to us that the plaintiff by falsely stating that the lady had the accounts and by declining even in the final stage of the case to produce the accounts has put himself out of court." So, where after a Naib of a Zamindar was removed from his office the Zamindar sued him for rendition of accounts for a certain period and it was proved that the papers necessary for furnishing the account were with the plaintiff and the latter would not produce the same, the suit was held as not maintainable.³ So, where in a suit for account it was found that the defendant had constantly rendered accounts which had been accepted by the plaintiff, that there was no allegation of fraud and that the plaintiff was unable to produce accounts and documents relating to the transactions in dispute which should be in his possession, the court held that the suit was liable to dismissal as the defendant could not under the circumstances be called upon to render accounts.⁴ Katiar observes:—

"A suit for account, it is submitted, is not a game of 'hide and seek'. When the agent has been rendering accounts from time to time and filing the papers in the principal's office and making them over to him after a settlement, if the principal questions the accuracy of these accounts, which must naturally be with him after the agent had done with them what he was required to do, it is a matter of natural justice and equity as well as of absolute necessity that these accounts should be before the Court. He has no right to conceal the account papers and then ask the agent to render account - a thing impossible on the face of it. Where, however, the account papers are in possession of the agent, the mere fact that their copy or duplicate or

1. See Katiar, p. 596 and the American authorities cited therein.

2. *Upendra Kishore Roy v. Ram Tara*, 18 C. W. N. 696 followed in *Dabendar v. Narendra*, 24 C. W. N. 110; *Thakurdas v. Janardan*, 56 I. C. 940.

3. *Jatendra Nath Datta v. Suresh Chandra Roy*, 24 C. W. N. 922; *Dabendra v. Narendra*, 24 C. W. N. 110; *Mohan Lal v. North Western Railway Co-operative Stores Assn.*, 5 Lah. L. J. 10.

4. *Mohan Lal v. N. W. E. Co., Stores Assn.*, 5 Lah. L. J. 19.

5. *Law of Agency*, p. 597.

abstract is in possession of the principal does not exonerate him from his duty to render account from his own papers and he cannot insist on the principal to produce such copy, duplicate or abstract before being called to render account. The case would be quite different if the originals are with the principal and the agent maintains only a copy of duplicate or abstract. In such case the principal would have no valid excuse for withholding the original and requiring the agent to render account on such copy duplicate or abstract and the principles involved in the cases cited above will bar the suit".

When account suit not maintainable.

It is not open to any principal who has got all the accounts in his possession to employ the machinery of the court for examining his accounts on the off chance of making his agent liable for any sum which on such examination may be found due from him.¹

Where an agent enters into a contract with a third person in his own name, and subsequently sues on the contract and obtains a decree, the principal is not entitled to maintain a suit for a declaration that he is beneficially interested in the decree and to recover the amount thereof from the judgment debtor. The fact that the principal is entitled to an amount from the agent does not entitle him to maintain a suit of this kind. He could have adopted the contract and sued on it himself; after a decree is passed for the agent, he is too late.²

Converting money suit into account suit.

In a suit by principal against the agent to recover a specific amount or balance as having been misappropriated by him, if it is impossible to decide upon the evidence adduced at the hearing how much of the principal's money was unaccounted for, the Court should order an account to be taken of the agent's dealings with the principal's money as in a suit for an account.³

Res judicata

In the *moffusil*, if a principal in a suit against the agent prays merely that the defendant be ordered to render accounts to the plaintiff, a second suit brought by him for the recovery of the money found due by the defendant on examining the account will not be barred by *res judicata*.⁴ Where an agent who was sued to account for money given to him instituted a separate suit claiming to recover a certain sum which he alleged was due to him from the principal over and above the amount in respect of which account was sought from him, *held*, that the decision in the former suit cannot operate as a bar to the trial of the latter on the principle of *res judicata*.⁵

On demand, the demand should be made at the place of business where the books of account and all material information might be available.⁶

1. *Naimi v. Gadadhar*, 1929 Cal. 418—120 I. C. 100; *Bharat v. Kiran*, 1925 Cal. 1669—90 I. C. 941—82 Cal. 768.

2. *Godhanram v. Joharwall*, (1912) 40 Cal. 335—18 I. C. 528.

3. *Hurvinath v. Krishna Kumar*, 14 Cal. 147. P. C.

4. *Gobind Mohun v. Sheriff*, 7 Cal. 169, discussion as to the form of plaint in suits for account.

5. *Chandra Kumar v. Pramadho Nath*, 15 C. W. N. 330

6. *Audinarayana v. Lukshminarayana*, 1940 Mad. 388.

The cause of action in a suit for account by the principal does not arise at the place where the principal resides as the contract is one of loan.¹

Place of cause of action.

A suit by a principal against his agent for an account and for money that may be due upon such account being taken is governed by Art. 89 of the Limitation Act.²

Limitation.

If accounts have been taken from time to time and settled between the parties, the agent while rendering the final account will be entitled to rely on those casual accounts and to urge that they ought to be accepted as being *prima facie* correct.³

Periodical accounts.

The liability of an agent to account is not a liability that arises by virtue of a contract between the parties but is a liability that is annexed by law to the office of the agent, and section 88 of the Indian Contract Act has nothing to do with it.⁴ The liability to account is irrespective of any express contract to that effect.⁵ This obligation may well subsist notwithstanding that the property entrusted to agent is proved to belong to some one other than the principal and it cannot disappear except by transfer of the contractual right by novation or operation of law.⁶

Express contract not necessary for liability to account.

A principal can sue an agent for a sum of money had and received on his behalf and may also bring a suit for account,⁷ and a claim for damages on account of loss caused by his laches can be included.⁸

An agent, entrusted with money or goods by a principal to be applied on the principal's account, cannot dispute the principal's title unless he proves a better title in a third person and that he is defending on behalf and with the authority of such third person: The same principal controls the relation of bailor and bailee.

Disputing principal's title

A suit for account lies against a servant on a fixed salary but the nature of whose employment is that of an agent.⁹

Agent remunerated by salary

As to the form of a suit for an account between a principal and an agent, see the undermentioned cases:¹⁰

A decree may be passed in favour of an agent in a suit brought by the principal for accounts.¹¹

Form of suit.

66. Agent's duty not to deny the principal's title to the property entrusted to him as agent.

Another rule which is a rule of estoppel and is formulated to safeguard the interests of the principal in the hands of an agent against invasion is that the agent is estopped from deny-

1. *Audinaryana v. Lakshminarayana*, A. I. R. 1940 Mad 599
2. *Jagendra Nath v. Deb Nath*, 9 C. W. N. 113
3. *Abhai Charan v. Kesho Das*, 15 I. C. 642 (All.).
4. *Jagdish Prasad v. Bijo Kuer*, 1923 Pat. 464=2 Pat. 585=75 I. C. 1032.
5. *Kumeda v. Anandoo*, 17 C. W. N. 5.
6. *Raja Bhagwant Singh v. Mebahuddin*, 1929 P. O. 129=115 I. C. 739=10 Lah. 352.
7. *Kishan v. Firm Sham Lal*, 1929 Lah. 94=109 I. C. 867.
8. *Ramesh v. Kasin*, 52 I. C. 71 (Cal.).
9. *Ganesadas v. Gangaram* 1930 Sind 142=123 I. C. 228.
10. *Depamber v. Kallynath* (1881) 7 Cal. 654; *Hurriath v. Krishna*, (1887) 14 Cal. 147; *Ram Lal v. Asian Assurance Co.*, A. I. R. 1933 Lah. 493=144 I. C. 535.
11. *Keshu Ram v. Dula Bai*, A. I. R. 1935 Lah. 723=179 I. C. 418; *Bhawan Sahai Sully Ram v. Chaffu Mal*, A. I. R. 1937 All. 276=183 I. C. 933.

ing the title of his principal to the property that comes into his possession as such, and from setting up a title of a third person in opposition to that of the principal. Bowstead thus states the rule of English law on the subject:¹

"Where a person is in possession of property as an agent, his possession, as evidence of title, and for the purpose of acquisition of title under a Statute of Limitation, is deemed to be the possession of the principal.

No agent is permitted to deny the title of his principal, or to set up the title of any third person in opposition to that of the principal, to any goods or chattels intrusted to him by, or which he has expressly or impliedly agreed to hold on behalf of, the principal. Provided, that where a third person is entitled to the goods or chattels as against the principal, and claims them from the agent, the agent may set up the title of that third person, if he does so on his behalf and by his authority, or if he has delivered up the goods or chattels to him, unless at the time when the goods or chattels were so intrusted to the agent, or when the agent so agreed to hold them on behalf of the principal, he had notice of the claim of such third person".

Thus, where an agent is permitted, for the convenient performance of his duties as such, to occupy premises belonging to his principal, the agent cannot acquire any estate therein, by reason of such occupation, even if he is permitted to use the premises for an independent business of his own.² No agent can acquire a title adverse to his principal unless he can show that the acts upon which he relies were done in respect of his title, and not of his agency.³

A receives the rents of certain properties as an agent, and pays them into a separate account at his own bank. The principal dies intestate. A continues to receive the rents for more than twelve years after the death of the principal, stating to several of the tenants that he is acting for the heir whoever he may be. Subsequently, within a reasonable time after the heir is ascertained, his assignee brings an action against A, claiming possession of the property and an account of the rents and profits. A claims the property as his own, and pleads the Statute of Limitation. The plaintiff is entitled to possession of the property, and an account of all the rents and profits received by A since the principal's death.⁴

A receives the rents of certain property as B's agent for more than twelve years, and duly pays them over to B. B thereby acquires a good prescriptive title to the property, in the absence of fraud, even if A were the true owner. Possession by an agent, as such, does not preserve his adverse rights.⁵

Where a solicitor paying off a mortgage debt due from a client enters into possession of the mortgaged property, he

1. Art. 49, p. 99.

2. *Whits v. Bayley*, (1861), 30 L. J. C. P. 232.

3. *At. Gen. v. Corporation of London*, (1849), 19 L. J. Ch. 314.

4. *Lyell v. Kennedy* (1859), 14 App. Cas. 487; *Smith v. Bennett*, (1874), 39 L. T. 100.

5. *Withams v. Poole*, (1871), L. R. 12 Eq. 149=40 L. J. Ch. 774.

must be taken to have acted as the agent of the client and cannot set up the Statute of Limitation as a bar to the client's action for redemption.¹

A makes advances for the purpose of a mine, in order to obtain the ore, which he consigns to B for sale, B undertaking to account to him for the proceeds. B cannot set up any paramount title to the ore, or dispute A's right to the proceeds, on the ground that there are rights of third persons existing independently of the contract between A and B.²

Where a person buys goods on another person's behalf and delivers them to carriers at the latter's risk, he is estopped from disputing the latter's title to the goods.³

Similarly, where the servant of a wharfinger gives a receipt for certain goods, in which there is an undertaking to deliver the goods to A, the wharfinger will not be permitted to deny A's title to the goods on their arrival.⁴

A warehouseman agrees to hold certain goods, described in a delivery order, on behalf of the transferee of such order. In an action by the transferee against the warehouseman for conversion of the goods, it is no defence that the goods in question were not separated from the bulk, and that therefore the property in the goods had not passed to the plaintiff.⁵ A warehouseman or wharfinger is an agent for the person in whose name he holds, or on whose behalf he has undertaken to hold, goods, and is not permitted to set up the title of any other person.⁶

A delivers goods to a carrier, consigned to B. The property in the goods has not, in fact, passed to B. A countermands his instructions, and the carrier re-delivers the goods to him. The carrier may set up A's title, in an action by B, carriers not being, as such, agents of their consignees.⁷

A wrongfully distrains B's goods and delivers them to C, an auctioneer, for sale, C having at the time no knowledge of B's adverse claim. B subsequently gives notice of his title to C, and claims the proceeds. C may set up the title of B, in an action by A for the proceeds, provided that he defends on B's behalf and with his authority.⁸

A sells goods as B's agent, having at the time when the goods are intrusted to him notice that C claims them. A cannot in an action by B for the proceeds, set up the title of C, even if C was wrongfully deprived of the goods by B, A having

1 *Ward v. Carttar*, (1865), L. R. 1 Eq. 29.

2 *Zulueta v. Vincent*, (1851), 1 De G. M. & G. 315.

3 *Green v. Maitland*, (1842), 4 Beav. 524.

4 *Evans v. Nichol* (1841) 4 Scott N. B. 43. And see *Wood v. Tussell* (1844), 6 Q. B. 224.

5 *Woodley v. Coventry* (1862), 32 L. J. Ex. 185; *Stonard v. Dunkin* (1810), 3 Camp. 344.

6 *Battleley v. Bead* (1843) 4 Q. B. 511; *Holl v. Griffin* (1839), 3 L. J. C. P. 17;

Geeling v. Birnie (1831), 7 Bing. 339; *Henderson v. Williams*, (1895), 1 Q. B. 521.

7 *Shirdan v. New Quay Co.*, (1856), 20 L. J. C. P. 56.

8 *Biddis v. Bond* (1865), 34 L. J. Q. B. 137; *Ems v. Edwards* (1895), 72 L. T. 100 P. C.; *Rogers v. Lambert*, (1891), 1 Q. B. 518. *Semble*, this principal is limited to bailment and title paramount to bailment: *Blauvelt v. Motts*, (1887) 2 K. B. 145.

elected to act as B's agent for the sale of the goods after receiving notice of C's claim.¹

67. Duties of particular classes of agents.

1. Factors.

It is the duty of a factor—

- (1) to give his principal the free and unbiassed use of his judgment and discretion;²
- (2) to act in person, unless authorised to delegate his authority;³
- (3) to keep and render just and true accounts;⁴
- (4) to keep the property of the principal separate from his own and from that of other persons;⁵
- (5) to keep each sale distinct and separate from other transactions;⁶
- (6) to account for goods sold, pay over the proceeds, and deliver unsold goods to the principal, on demand;⁷
- (7) to keep goods entrusted to him for sale with as much care as would be taken by a prudent man in respect of his own goods,⁸ and not to barter⁷ or pledge them⁹ unless expressly authorized to do so;
- (8) to insure goods consigned to him, if instructed to do so, or if he has been in the habit of doing so;⁹
- (9) not to purchase the principal's goods for himself, without full and fair disclosure;¹⁰
- (10) not to set up a rival business or make secret profit, without a full and fair disclosure of all the facts to the principal and obtaining his assent thereto.¹¹

A factor is also bound to keep his principal informed of every fact in relation to his agency which comes to his knowledge and which may reasonably be deemed important for the principal to know in order to the protection and promotion of his interest; and to faithfully obey his instructions, unless his own interest in the goods, or a sudden emergency, requires a deviation from them. Where there are no instructions to the factor as to the time, place or price regarding the sale of goods entrusted to him, or where he is instructed to deal with them as with his own, he can sell the goods at such time, place, or price, as a prudent man would do as regards his own goods. He must sell them within a reasonable time and if he delays and the goods deteriorate in value he may be held liable for the loss. On

1. *Ex. p. Davies, re Sadler*, (1881), 12 Ch. D. 86, C. A.

2. *Clarke v. Tipping* (1846), 9 Beav. 284; *Gray v. Haig* (1854) 30 Beav. 219=100, R. R. 296.

3. *Cockran v. Ilam* (1819), 2 M. & S. 301.

4. *Guerrero v. Pelle* (1820), 2 B. & A. 616.

5. *Topham v. Braddick*, (1800), Taunt 572.

6. *Oggs v. Bernard*, 2 Ld. Raym. 908, 618.

7. *Guerrero v. Pelle* (1820), 2 B. & A. 616.

8. *Martini v. Cole* (1813), 1 M. & S. 149; *Gill v. Kymer* (1821), 5 Moo. 508;

9. *Fielding v. Kymer* (1821) 2 B. & A. 629.

10. *Smith v. Lancelotti*, (1788) 2 T. R. 187.

11. *Clarke v. Tipping*, (1846), 9 Beav. 284; See Bowstead, pp. 117, 118.

12. See Kistler, p. 717 and the authorities cited therein.

the other hand, if he sells them within a reasonable time he is not liable even though would have fetched a better price if he had stayed longer. Where he is not guilty of an unreasonable delay he is not liable even if the goods are destroyed by fire. He must sell the goods in the local market and cannot consign them to be sold elsewhere, unless there are instructions to that effect. If he consigns them elsewhere in exercise of his own discretion or in pursuance of a trade usage he must bear any loss which results therefrom unless he can show that the usage was so general as to warrant a presumption that the consignment was made in pursuance thereof or that it was known to the principal. In the absence of instructions as to price a factor is bound to sell the goods for a fair value or market price¹

An auctioneer, being a person who professes to carry on a business requiring skill and knowledge, must display such skill and knowledge in acting for his vendor as is reasonably to be expected from competent auctioneers, and must follow the course of business ordinarily recognized by custom or prescribed by statute. For a breach of any duty he will be liable in damages, either nominal where no material injury results or substantial and of an amount to compensate the vendor for any actual loss sustained through the negligence of the auctioneer, or of persons employed by him²

(2) Auctioneers.

It is the duty of an auctioneer :—

- (1) to act in person,³
- (2) to sell for ready money only, in the absence of instructions to the contrary;⁴
- (3) to disclose his principal;⁵
- (4) to use due diligence in requiring that the deposit be duly paid,⁶ and if it be paid to him, to hold it as stakeholder until the completion of the transaction;⁷
- (5) to sell to a third person;⁸
- (6) to accept the highest *bona fide* bid, where he sells without reserve, notwithstanding express instructions from his principal to the contrary;⁹
- (7) to account for the proceeds of goods sold to the persons from whom he received them;¹⁰
- (8) not to deliver goods sold until paid for, nor allow any deduction from the price, unless authorized to do so by the principal;¹¹

1. Kistner, pp 717-719 and the American authorities cited therein.

2. Halebury, Vol I, 2nd Edn, Art 1173, p. 711 and the authorities cited therein.

3. *Coles v Trecothick* (1804), 9 Ves 284. In England every person who acts as an auctioneer must take out a licence under the Auctioneers Act, 1845.

4. *Ferrers v Robbins* (1835), 2 C M & B 151, *Sykes v Giles* (1839) 5 M. & W 645.

5. *Franklyn v Lamond* (1847), 16 L. J. C. P. 221.

6. *Hibbert v. Bayley* (1860) 2 F. & F 48; *Anderson v. Sotheby*, (1831), 47 T. L. R. 241. It is not negligence for an auctioneer in the exercise of his judgment, not to insist upon a payment of a deposit by a purchaser.

7. *Gray v Gutteridge*, (1827), 3 C & P 40.

8. *Oliver v. Court* (1830), Dan 301.

9. *Warburton v. Harrison* (1858), 29 L. J. Q. B. 14.

10. *Crosskey v. Mille* (1834), 1 C. M. & B. 296; *Parsons v. Dunsbury*, (1837), 3 T. L. R. 254, C. A.

11. *Brown v. Staton* (1816), 2 Chrt. 353.

- (9) If appointed to conduct a sale by the court, to pay in to court, or to the solicitors of the vendors for payment into Court, any money received by him.¹
- (10) Since the auctioneer is a bailee for reward, he must exercise ordinary care and diligence in keeping the goods intrusted to him.²
- (11) In the absence of authority from the vendor, it is the duty of the auctioneer not to part with possession of the goods until the purchaser has paid the price. If the auctioneer does so and the purchaser fails to pay, the auctioneer will be liable to the vendor for the amount.³
- (12) An auctioneer must redeliver goods to the vendor on demand, except where his right of lien exists, either before sale if the authority to sell is revoked, or after sale if the goods are unsold. Like other bailees, he is estopped from setting up the title of a third person against the bailor, unless the bailment is determined by what is equivalent to an eviction by title paramount, and the auctioneer defends upon the right and title and by the authority of such third person.⁴ Even with such authority he cannot set up the *ius tertii* if he was aware of the adverse claim at the time when he accepted his employment.⁵
- (13) It is the duty of the auctioneer to sign a proper contract binding the purchaser; and, if he omits to do so, he is liable to the vendor for any damages sustained in consequence of his neglect.⁶
- (14) A purchase by the auctioneer himself without the vendor's consent is voidable, and will be set aside at the instance of the vendor, even after a long lapse of time unless there is evidence of acquiescence.⁷
- (15) An auctioneer must account for any moneys received by him on the vendor's behalf, and be ready to pay them over to him. He is in a fiduciary position in respect of such moneys,⁸ and an order to pay can be made against him as trustee. If he fails to do so he is liable civilly as well as criminally to the vendor like any other agent mis-appropriating his principal's property.⁹

1. *Bugs v Bree*, (1882), 51 L. J. Ch. 64.

2. See Halsbury, Vol. I, 2nd Edn., Art. 1174, p. 711. The dictum in *Maltby v. Christie* (1795), 1 Esq. 840, to the effect that an auctioneer is only liable for such care as he would take in the case of his own goods, would not seem on principle to be good law. See *Coggs v Bernard* (1703), 2 Ld. Raym. 909, per Lord Holt, at p. 917.

3. *Brown v Staton* (1816), 2 Chitt. 353.

4. *Biddle v Bond*, (1865), 6 B. & S. 225; *Thorne v. Tilbury* (1858) 3 H. & N. 534, 537.

5. *Re Sadler Ex parte Davies* (1881), 19 Ch. D. 86.

6. *Petres v. Corf* (1874), L. R. 9 Q. B. 210.

7. *Oliver v. Court* (1820), 3 Price, 127; *Salomons v. Pender*, (1865), 3 H. & C. 639.

8. *Re Cotton, Ex parte Cooke* (1913), 109 L. T. 310, C. A.

9. *Crowther v. Elgood*, (1857), 34 Ch. D. 691, C. A.;

See, however, *Henry v. Hammond*, (1913), 2 K. B. 515 where *Crowther v. Elgood* does not appear to have been cited. See also *Katlar*, p. 129.

Payment should in general be made to the vendor, and not to his solicitors except by his express directions.¹

It is the duty of a broker—

(a) ~~to~~ *to* ~~the~~ *the* ~~broker~~ *broker*.

- (1) to contract in the name of his principal, subject to any special instructions or usage to the contrary.² For instance, a broker is authorised to buy wool in the Liverpool market. By the custom of that market a broker, so authorised, may buy either in his own name or in the name of the principal without giving his principal notice whether he has bought in his own name or not. Such a custom is not unreasonable, and the principal is bound by a contract made in the name of the broker, though he had no notice of the custom or of the fact that the contract was made by the broker in his own name;³
- (2) to execute contracts in such a way as to be legally binding on both parties,⁴ and so as to give each party a right to sue thereon;⁵
- (3) to inform his principal of the terms of any contract made on his behalf;⁶
- (4) to comply with statutory provisions in entering into contracts, notwithstanding a custom amongst brokers to disregard such provisions;⁷
- (5) to make a careful estimate of the value of goods which he is instructed to sell, so that he may not sell them for less than their value;⁸
- (6) to exercise his skill and fairly communicate his opinion to his principal;⁹
- (7) not to deliver goods sold by him except in accordance with the terms of sale;¹⁰
- (8) not to sell his own property to his principal nor buy the principal's property himself, without full and fair disclosure.¹¹
- (9) For a similar reason a broker is not permitted to represent the other party also in the same transaction without the full knowledge and consent of the principal.¹² Where, however, he acts as a middle man merely bringing together parties who then deal with themselves and make their own bargain relying upon

1. *Brown v Farebrother*, (1888), 59 L. T. 822.

2. *Baring v Corrie*, 2 B. & A. 137.

3. *Cropper v. Cook*, L. R. 3 C. P. 194.

4. *Grant v. Fletcher* (1826), 5 B. & C. 436.

5. *Robinson v. Mallett*, L. R. 7 H. L. 802, *Bnstock v. Jordine*, 3 H. & C. 700; *Scott v. Godfrey*, (1901) 2 K. B. 726; *May v. Angell*, 14 T. L. R. 551, H. L.; *Consolidated Goldfields v. Spiegel*, 100 L. T. 351.

6. *Johnson v. Kaurley*, (1908) 2 K. B. 514.

7. *Neilson v. James* (1882), 9 Q. B. D. 546.

8. *Solomon v. Barker* (1862), 2 F. & F. 726.

9. *Ex p. Dyester* (1816), 2 Rose 349.

10. *Boorman v. Brown* (1842), 11 C. & F. 1.

11. *Wilson v. Sport*, 6 Hare, 356; *Tetley v. Shand*, (1872), 25 L. T. 658.

12. *Wison v. Short* (1847), 6 Hare 366; *Tetley v. Shand* (1872), 25 L. T. 658, *Reichsuld v. Broekman* (1891), 2 Dow & OL 188, H. L.; *Ex p. Huith*, Re. *Fember-ton*, 1840 M. & C. 667.

their own judgment and skill, there is no inconsistency in his conduct if he acts for both parties even though he was employed by each without the knowledge of the other.¹

- (10) It is not part of the duty of a broker, in the absence of a special contract or custom, to examine goods bought by him, for the purpose of ascertaining whether they are of the quality bought.²

It is the duty of a shipmaster to give the whole of his time to the service of his principal, and therefore not to trade on his own account,³ nor give any portion of his personal services to another.⁴ A custom for shipmasters to trade on their own account is, apparently, unlawful.⁵

1. *Bates v. Copeland*, 11 M. & M. 50; *Lewis v. Denton*, 3 App. Cas. 387 D. C.; *Meehem*, 8. 2412.
2. *Meehem*, 8. 2413; *Clark v. Allen*, 125 Cal. 276; *Frier v. Smith*, 46 L. R. A. 229; *Quinn v. Burton*, 195 Mass. 277.
3. *Zeilichenbart v. Alexander*, (1860), 1 B. & S. 234 See Bowstead, pp 118, 119.
4. Bowstead, p. 119; *Gardner v. M' Cutcheon* (1842), 4 Beav. 534.
5. *Thompson v. Havelock* (1808), 1 Camp. 527.

CHAPTER X

DUTIES OF THE PRINCIPAL TO HIS AGENT.

68. Agent's right to remuneration 69. Principal's duty to keep the agent employed according to the terms of the contract. 70. Agent's rights of reimbursement and indemnity against the principal. 71 Agent's lien on principal's property 72 Other rights of an agent arising from the duties of the principal

68. Agent's right to remuneration.

As already observed¹, no consideration is necessary to create an agency. Where a person agrees to be an agent of another the contract of agency is created and the relation of principal and agent is constituted between the parties. It is not material whether the offer on the part of the agent is simply gratuitous and without any consideration.² So, in the absence of an express or implied contract to pay remuneration to an agent, the mere existence of the relation of the principal and agent between two persons does not throw on the principal a duty to remunerate the agent, nor does it entitle the agent to claim any remuneration.³ Services, howsoever long continued, create no right to remuneration unless there is a contract to pay it, and such a contract will only be implied where the circumstances are such as to indicate an understanding between the parties that there should be remuneration.⁴ So, where a committee resolved that any services rendered by the agent should be taken into consideration and such remuneration be paid to him as should be deemed right no action would lie to recover such remuneration, the resolution only importing that the committee were to judge whether any, and if so, what remuneration was due for the services rendered by the agent.⁵ "It is settled", observes Bell, J. "that no man can do another an unsolicited kindness and make it a matter of claim against him and it makes no difference whether the act was done from mere good will or in the expectation of compensation. Unless the party benefited has done some act from which his assent to pay for the services may be fairly inferred, he is not bound to pay."⁶

No consideration necessary to create agency

Thus, the right of an agent to be remunerated for his services, is founded upon an express or implied contract between the principal and agent.⁷ A contract for the payment of remuneration may be implied from custom or usage, from the conduct of the principal, or from the circumstances of the particular case.⁸ In *Bryant v. Flaherty*⁹

Agent's right to remuneration founded on express or implied contract

¹ See notes on page 70

² *Bhobun Chunder, Sen v. Ram Sunder Surma* 3 Cal 300

³ See Halsbury, Vol. I, 2nd Edn., Art 482, p 257

⁴ *Rogers v. Reese*, 1 F. & F. 280; *Foord v. Morley*, 1 F. & F. 496, *Loftus v. Roberts* (1902), 18 T. L. R. 532, O. A.

⁵ *Taylor v. Hiewer*, 1 M. & S. 290

⁶ Per Bell, J. in *Chadwick v. Knox*, 64 Am. Dec. 329. See also *Alexander v. Bane*, 1 M. & W. 511, *Katlar*, p. 436 and the American authorities cited therein

⁷ Bowstead, Art 64, p. 142

⁸ *Ibid*

⁹ (1889), 5 M. & W. 114. See also *Jenry v. Busk* (1814), 5 Taunt. 302, *Bird v. M'Gakey* (1849), 2 C. & K. 707.

A entered into an agreement in the following terms—"I hereby agree to enter your service as weekly manager, and the amount of payment I am to receive I leave entirely to you"—and served in that capacity for six weeks. Held, that there was an implied contract to make some payment, at all events, and that A was entitled, in an action on a *quantum meruit*, to recover such amount as the employer, acting in good faith, ought to have awarded. Similarly, where A employs an auctioneer to sell property on his behalf, a contract by A to pay the auctioneer the usual commission is implied.¹ The mere employment of a professional man, as such, raises a presumption of an intention to remunerate him, and an agreement to do so is implied from such an employment, in the absence of other circumstances rebutting the presumption.²

It is entirely competent for the parties to agree expressly not only that the agent shall be compensated for his services, but that his compensation shall be a certain sum, or shall be paid in a certain way, or shall be ascertained in a particular manner.³ It is also competent for them to agree that he shall receive no compensation at all.⁴ In practice, however, it is frequently, if not commonly, found that the parties have not made any express agreement at all, or that if they have attempted to do so, the agreement does not provide for all of the details and contingencies so that the questions are constantly arising, when will the law imply a promise to pay compensation and how shall the amount to be paid be ascertained.⁵

Express
agreement
conclusive.

An express contract necessarily supersedes and excludes all implication as to the matters expressed, according to the maxim *expressum facit cessare tacitum*. Where therefore the remuneration of an agent is provided for by an express contract, no other contract which is inconsistent with the terms thereof, whether founded on custom or otherwise, can be implied; but evidence of a particular custom or usage may be given for the purpose of explaining any ambiguity in the terms of the express contract, or for the purpose of incorporating a provision which is not inconsistent with the terms thereof.⁶

In *Bowser v. Jones*⁷ it was agreed that an agent should receive commission on "all sales effected or orders executed by him". By a custom of trade, no commission was payable in respect of bad debts. Held, that the agent was, nevertheless, entitled to commission on all sales effected by him, including those resulting in bad debts, the custom being inconsistent with the terms of the contract. Similarly, if an agent is employed to find a purchaser for certain property at a fixed commission, to be payable only in the event of success, he is not entitled to a *quantum meruit* in the absence of success, such a claim being

1. *Miller v. Beale* (1879), 27 W. R. 408 *Turner v. Rees*, (1901) 17 T. L. R. 592

2. *Manson v. Billie*, (1855), 2 Maoq. H. L. Cas. 80, H. L.

3. *Meohem*, 8. 1513.

4. *Bowstead*, Art. 64, p. 142 and the authorities cited therein.

5. (1881), 8 Bug. 65.

excluded, by the express contract.¹ So, where it was agreed that a sailor should be paid a fixed sum provided he continued to serve, and did his duty, during the whole voyage, it was held that no wages could be claimed, either on a *quantum meruit* or otherwise in the event of his dying before the completion of the voyage.² On the other hand, where an engineer contracted to perform certain works, calculated to take fifteen months, for a sum of £500, payable by quarterly instalments, and died during the work, it was held that his representatives were entitled to recover two instalments which had accrued due, and were unpaid, at the time of his death.³

It has been held that where the agent sets up a definite promise for a certain definite remuneration, he cannot recover on a *quantum meruit*, for that implies that the principal accepted his services on the understanding that he would pay for them what they were worth, while the real contract set up was that if the agent did a certain thing he would be paid a certain amount. Thus, where an agent proved that principal had agreed to pay him 2½ per cent, if he introduced a person who bought the property for 19,000 l., and it was proved that the purchaser had failed to complete his bargain, and that the principal had only obtained 7,000 l., for part of the property, the Court held that the agent was entitled to nothing, and could not sue on a *quantum meruit*. Lord Justice Lindley in giving judgment said: "It was said that there was an implied contract to pay the agent a *quantum meruit* for his services. The answer was that there could be no implied contract where there was an express contract."⁴

It is also clear that if the principal has expressly agreed to pay a compensation, the fact that the service was, through no fault of the agent, of no value to him, furnished no excuse for not paying.⁵ So, if the agent has expressly agreed to serve without compensation, he will have no claim for wages howsoever beneficial his service may have proved to the principal.⁶ If compensation is to be paid only on a certain event, or upon the happening of a certain contingency, no claim can arise except upon the happening of the event or contingency agreed upon.⁷

Where the remuneration of an agent is not provided for by an express contract, but the circumstances of his employment are such that a contract for the payment of remuneration may be implied, the amount of the remuneration, and the conditions

Implied contract.

1. *Green v. Mules* (1861), 30 L. J. C. P. 848; *Mired v. Artola* (1889), 6 T. L. R. 68; *Salter's claim* (1891), 7 T. L. R. 602 *Lott v. Outhwaite* (1893), 10 T. L. R. 76, C. A. If the express contract for remuneration were a nullity, by reason of its having been made without authority, the agent will not thereby be prevented from recovering upon a *quantum meruit*: *Graven - Ellis v. Canons Ltd.*, (1896), 2 K. B. 408.
2. *Cutter v. Powell* (1795), 6 T. R. 820=3 R. R. 185.
3. *Stubbs v. Holywell Ry.* (1867), L. R. 2 Ex. 311.
4. *Lott v. Outhwaite* (1893), 10 Times, 76 *Battans v. Tompkins* (1892), 8 Times, 707; *Howard v. Mansel Jones SS. Co.*, (1928) 1 K. B. 110.
5. *Webb v. Rhodes*, 3 Bing. N. C. 732; *Mohr v. Marten*, 7 T. L. R. 890.
6. *Mechem*, §. 1514
7. *Ibid.*

under which it becomes payable, may be ascertained from the custom or usage of the particular business. Where there is no such custom or usage, the implied contract is to pay reasonable remuneration.¹ A London shipbroker negotiated for the hire of a vessel, and a memorandum of charter was duly signed, but the contract afterwards went off. By a custom of the City of London, shipbrokers who negotiate the hire of vessels are entitled to a certain commission on the amount of the freight, where the contracts are completed, the rate of payment being higher than would fairly compensate them for their services; but are not entitled to any remuneration with respect to contracts which are not completed. Held, that the broker was not entitled to recover either commission or upon a *quantum meruit* for the services rendered, even if the contract went off owing to the act of the principal. The implied contract to pay an agent reasonable remuneration for his services does not arise when there is an express agreement, or is to be inferred from custom, which is inconsistent therewith.²

As previously observed, the mere fact that services have been rendered by the agent for the principal is not, of itself, sufficient to raise a promise to pay therefor, but they must have been rendered under circumstances from which a promise to pay can be inferred.³ So, in the absence of an express or implied agreement to pay, no recovery of compensation can be had by the agent for the services volunteered or even for the services requested for, but done as a spontaneous act of kindness.⁴ Where services are rendered for each other by near relatives or others constituting members of the same family the law presumes that they are inspired by motives of affection or gratitude or are based on other considerations than those of pecuniary recompense; and in order to rebut this presumption there must be clear and unequivocal evidence of a promise or agreement to pay for the services rendered.⁵ There must be shown to have been something more than a mere intention to pay, based upon gratitude or friendship, *i. e.*, a clear and unequivocal agreement to pay.⁶ No such agreement can be implied in such cases whether one undertakes to do some act for another out of kindness or friendship merely, or with a hope, and perhaps, on expectation that the other will recognize the value of the services and compensate him accordingly. So architects, engineers, authors, artists, and others who undertake to furnish a satisfactory plan, design, machine, story or other thing in competing for a prize, contract, or regard but without success can have no claim for compensation in the absence of an express agreement to pay it, although they may have been requested to

1. Bowstead, Art 64, pp 142, 143.

2. *Read v. Ems* (1880) 8 L. J. (O S) K. B. 144; *Broad v. Thomas* (1880), 7 Bing. 99, *Harley v. Nugate* (1917), 84 T. L. R. 124, *cp. Moor Line v. Dreyfus* (1918) 1 K. B. 89, *Affaire de Reunis v. Walford* (1919) A. C. 801—88 L. J. K. B. 861, E. L.

3. Mechem, § 1516; Katlar, p. 459 and the authorities cited therein.

4. Katlar, p. 459 and the authorities cited therein.

5. Mechem, § 1515.

6. Katlar, p. 459 and the American authorities cited therein.

contracts.¹ So also no contract to pay will be implied in the face of an express refusal, or where the implication would be repugnant to an express promise or where circumstances rebut all the grounds upon which a promise to pay could be inferred.² Similarly, where the circumstances account for the transaction on some ground more probable than that of a promise to recompense, no promise will be implied.³

All contracts for services must be good or bad at their inception, and a party will not be permitted on account of subsequent events to recover for services which when rendered were intended to be gratuitous.⁴ For instance, a subsequent promise to pay for services already rendered gratuitously does not entitle the agent to claim such payment.⁵ But when beneficial services, not intended to be gratuitous, have been rendered under such circumstances that no legal claim exists therefor, a subsequent promise to pay in consideration of the benefit received is binding on the principal.⁶

It has been held by the American authorities that whenever services are rendered by one person at the express request of another, "the law will, except in the case of near relatives or others who are members of the same family, presume that the person for whom they were rendered intended to pay for them and if the latter alleges that they were gratuitous, the burden of proof is upon him to establish it." This is particularly true where the services rendered are in the line of the agent's business or profession, or are of a kind which are usually paid for.⁷ For instance, where a person employs an attorney to try his case in court, or a physician to attend his child in illness, or an auctioneer to sell his goods at an auction, or a broker to effect insurance upon his ship, but says nothing about paying, the law will presume that the person so employed was to be paid for his services, and if the other party alleges that the services were to be rendered without charge he must prove it.⁸

A promise to pay may be implied from the circumstances. If, for instance, beneficial services are rendered for a person under such circumstances as to show that the agent expects to be paid for them as a matter of right and the person for whom they are rendered does nothing to disabuse him of this expectation, but permits him to render the services, the law will imply a

1. *Scott v. Maier*, 56 Mich. 554; *Palmes v. Haverhill*, 98 Mass. 487.

2. *Watson v. Steever*, 25 Mich. 886.

3. *Wood v. Ayres*, 39 Mich. 345.

4. *James v. O'Driscoll*, 1 Am. Dec. 682.

5. *Allen v. Bryson*, 56 Am. Rep. 358.

6. *Katlar*, p. 440 and the American authorities cited therein.

7. See *Katlar*, p. 441 citing American authorities. The term 'members of the same family' does not include persons who apparently work as hired labourers or who by fraud or misrepresentation or otherwise were prevented from settling their wages.

8. *Linn v. Linderoth*, 40 Ill. App. 320.

9. *Mechem*, §. 1518. It has been held under the English law that no barrister has any legal right to recover any fee or remuneration for services rendered by him, as such, nor is any promise to pay him for any such services binding, either at law or in equity - *Bowstead*, p. 143 citing *Kennedy v. Brown* (1864), 32 L. J. C. P. 197; *Re Sandiford*, (1895) Ch. 681=104 L. J. Ch. 885.

promise to pay for them.¹ Of course, no one has a right to thrust his services upon another against his will, but one who stands by and permits another to render valuable services to him under such circumstances as to convince any reasonable man that they were being done, though mistakenly, but in good faith with the expectation of being paid for them as a matter of legal right and not as a matter of mere hope or expectation, and says or does nothing to prevent it, cannot be permitted to avail himself of the benefits of the services, but refuse to pay for them upon the ground that they were rendered without his request or order.²

A contract or promise to pay may also be implied from the custom or usage of the business in which the services have been rendered.³ As already noted, professional services which are usually paid for, generally imply a promise to pay. For instance, where a person employs an auctioneer to sell his property on his behalf a contract to pay the auctioneer his usual commission is implied.⁴ So, the mere employment of a professional man as such, raises a presumption of an intention to remunerate him and an agreement to do so is always implied from such an employment, in the absence of other circumstances rebutting the presumption.⁵

If the agent relies on custom for the amount of his remuneration he cannot claim on a *quantum meruit*. Custom supposes a special contract between the parties, and if that is not satisfied no claim arises at all, for no other contract can be implied.⁶ The amount of remuneration is usually fixed by the custom of the place and trade.⁷ In some cases, if a special contract is not executed, it may give rise to a *quantum meruit*, as where goods not of the quality ordered are retained. There a contract arises to pay what they may be worth. So where it may be evident that the original contract could not be carried out between the principal and agent, and after that the principal accepts the services of the agent to do something else, claim for a *quantum meruit* may arise.⁸

Where the remuneration of an agent is a commission upon transactions brought about by him, or is only payable in the event of a transaction being brought about by him, he is not entitled to be paid such remuneration unless the transactions in respect of which it is claimed is a direct, though not necessarily an immediate, result of his agency, and is a transaction the bringing about of which was within the scope of his employment, but it is not necessary, in order to entitle him to payment of such remuneration, that he should complete the transaction,

Commission only on transactions directly resulting from the agency.

1 See Katlar, pp. 441, 442 and the authorities cited therein.

2 Mechem, § 1519; See Brewer J in *Muscott v. Stubbs*, 24 Kan 530.

3 *Cohen v. Paget*, 4 Camp. 96; *Barnett v. Bouch*, 9 Q. & P. 620; *Brood v. Thomas*, 7 Bing. 99; *Bucher v. Lunt*, 3 F. & F. 959; *Baring v. Stanton*, 3 Ch. D. 502; *Hall v. Benson*, 7 C. & P. 711; *Kirk v. Keane*, 6 T. L. R. 9; *Turner v. Beene*, 17 F. L. R. 592.

4 *Miller v. Beale*, 27 W. L. R. 403; *Turner v. Beene*, supra.

5 *Manson v. Baillie*, 2 Macq. H. L. Cas. 80.

6 *Reed v. Rann* (1830), 10 B. & C. 498 cited at p. 420.

7 *Cohen v. Paget* (1814), 4 Camp. 96.

or even that he should be acting for the principal at the time of the completion thereof.¹

The question whether an agent is entitled to commission upon business arising wholly after his employment has ceased as a result of his introduction, depends upon the nature and terms of his employment. *Prima facie*, he is not so entitled.²

Thus, where A employs B, a broker, to obtain a contract for a charterparty, and B introduces, C, who is also a broker, and C introduces D, who obtains a contract, B has no claim upon A for commission, the transaction being too remote a consequence of his introduction. A custom for a broker to be paid commission in such a case is invalid.³

A house agent lets a house for a term of years, the tenant having the option of taking it for a further term. The tenant afterwards, through the intervention of another agent, takes the house for a further term at a different rent. The first-mentioned agent is not entitled to commission in respect of the further term, and a trade custom to pay commission to the original agent under such circumstances is invalid. He is entitled to commission only upon the rent obtained as a proximate consequence of his own acts.⁴

So also, where an agent is employed, to let an estate and procure a tenant, he is entitled to a commission on such procurement only and cannot claim a commission on the sale of the estate to such agent brought about without any further intervention on his part subsequent to such letting out.⁵ But where an estate agent, who was employed to find a purchaser for certain property, introduced a purchaser to his principal, but the transaction of sale could not be effected because of the principal becoming bankrupt afterwards on a sale being effected with the same purchaser after further negotiation between him and the trustee in bankruptcy, it was held that the agent was entitled to his commission on such subsequent sale as being the result of his introduction and he can prove the amount in the bankruptcy proceedings.⁶ Where, however, the transaction could not be completed with the introduced purchaser because the latter had no funds to pay the price, it was held that the agent was not entitled to any commission.⁷

An auctioneer and estate agent was employed to sell an estate, a reserve price being fixed, commission to be paid if the estate should be sold. He put it up for sale, but it was not sold. A person who attended the sale, afterwards asked the

1. Bowstead, Art. 65, p. 145.

2. *Ibid*

3. *Gibson v Crick* (1862), 31 L J. Ex 304, *Wilkinson v Alston* (1879), 48 L J. Q. B 733, C A

4. *Currie v Nixon* (1871), 24 L T 706 See also *Ex p Chatteris* (1874), 22 W. R. 289; *Lofts v Bouke* (1884), 1 T L R. 58, *Miller v Radford* (1903), 19 T. L. R. 575, C A

5. *Toulmin v Miller* (1887), 58 L T 96, H L, *Nightingale v. Parsons*, (1914) 2 K B. 621, *Mote v. Gould* (1934), 152 L T 847.

6. *Ex p. Durrant, re Beale* (1898), 5 M B R. 37.

7. *Foucar & Co., v M. C. T. Mudaliar*, 1924 Rang 282, *Ayyannah Chetty v Subramania Iyer*, 1924 Mad 212.

auctioneer who was the owner of the property, was referred by him to the principal, and eventually became the purchaser of the estate. Held, that the auctioneer was the *causa causans* of the sale, and was therefore entitled to his commission, although before the actual sale, the vendor had withdrawn the property from him.¹ An agent who brings about the relationship of buyer and seller is entitled to commission, though he does not actually complete the contract.² In all such cases, however, it is not sufficient for the agent to show that the transaction would not have been entered into but for his introduction. He must show that the introduction is the direct cause of the transaction.³ A entered into an agreement with B in the following terms:-

"In case of your introducing a purchaser (of a certain business) of whom I approve, or capital which I should accept, I could pay you five per cent. commission, provided no one else is entitled to commission in respect of the same introduction". B introduced C, who advanced £10,000 by way of loan, and B was duly paid his commission in respect of that advance. Some months afterwards, A and C entered into an agreement for a partnership, C advancing a further £4,000 by way of capital. Held, that B was not entitled to commission on the £4,000, that amount having been advanced in consequence of the negotiations between A and C for a partnership with which B had nothing to do.

In *Mansell v. Clements*⁴, a house agent was instructed to offer a house for sale and it was agreed that he should receive 2½ per cent commission on the price if he found a purchaser, or a guinea for his services if the house was sold without his intervention. A person called on the agent and obtained an order to view, but thought that the price was too high. The same person subsequently renewed negotiations with a friend of the principal's, and ultimately bought the house. Held, that there was evidence for the jury that the house was sold through the intervention of the agent, so as to entitle him to his commission.

A brewery company agreed to pay an agent commission on all licensed property it might purchase through his introduction. The company promoted a new company, which acquired property introduced to the old company's notice by the agent. Held, that the new company being merely ancillary to the old, the agent was entitled to commission on the properties purchased.⁵

Where an agent introduced a person to the principal as a possible purchaser of certain property, but no terms having

1. *Green v. Bartlett* (1863), 32 L. J. C. P. 261; *Walker v. Fraser*, (1910) 8. C. 222; *Burchell v. Gonerie, etc., Collieries*, (1910) A. C. 614.
2. *Fryde v. Taylor*, (1876), 1 C. P. D. 505; *Boyd v. Tool paper Co.*, (1884), 4 T. L. R. 332 C. A.; *Müller v. Radford*, (1908), 19 T. L. R. 575, C. A.
3. (1874), L. R. 9 C. P. 139. See also *Barnett v. Brown* (1890), 6 T. L. R. 463; *Steele v. Smith*, (1886), 2 T. L. R. 231; *Bayley v. Chadwick* (1878), 39 L. T. 423, H. L.; *Burton v. Hughes*, (1885), 1 T. L. R. 207; *Thompson v. Thomas*, (1896), 11 T. L. R. 304, C. A. Comp. *Brandon v. Hanna*, (1907), 2 Tr. R. 212, C. A.
4. *Gunn v. Shanell's Brewery Co.*, (1902), 50 W. R. 659, C. A.

been arrived at with him, the principal subsequently sold the property by auction and the person introduced by the agent purchased it, it was held that the agent was not entitled to commission.¹

A agreed to pay B a commission of £5,000 in the event of B introducing a purchaser of A's business. B failed to find a purchaser, but introduced C, an accountant, as a person who might be able to introduce a purchaser. C eventually himself bought the property at the proposed price after deducting the commission which he was to have been paid in the event of his finding a purchaser. Held, that there was no evidence that B had introduced a purchaser of the business, he having introduced C, not as a purchaser, but as an agent to find a purchaser, and that B could not recover either the agreed commission or a *quantum meruit*, the claim for a *quantum meruit* being excluded by the express contract.²

The proper question in all those cases where an agent is engaged to sell property is whether the sale really and substantially proceeded from the agent's acts and if it is found that the agent's introduction is really the foundation of the negotiations which resulted in an ultimate sale the principal cannot deprive him of his commission even by withdrawing the property from his hands.³ Where an agent claims commission for procuring a loan, it is not sufficient to show that the loan indirectly resulted from his intervention. He must show that it was obtained by means of the agency, from the parties to whom he applied. If third persons casually heard that a loan was wanted, and lent the money directly to the principal, the agent cannot claim commission thereon.⁴

An agent is employed to make inquiries concerning a particular business with a view to the purchase of it by his principal and upon the terms that the principal will pay a commission upon the purchase-price if the purchase should be transacted. If the principal and vendor are brought together by the agent the commission is earned, although the purchase is ultimately effected through the intervention of another agent, provided that the agent's services are really instrumental in bringing about the transaction.⁵

An agent is employed to sell goods on commission, and the principals agree "to allow him commission upon all orders executed by them and paid for by the customers arising from his introduction". He is entitled to commission on all orders executed for customers introduced by him, even if the orders are received after his dismissal from the principal's employment.⁶ So, where the agreement was to pay commission on all accounts introduced by the agent, so long as the principals continued to do business with the persons he placed on their books, it was

1. *Tuplin v. Barrett*, 5 T. L. R. 30.

2. *Barnett v. Isaacson*, (1938), 4 T. L. R. 645, C. A.

3. *Wilkinson v. Martin* (1837), 5 C. & P. 1.

4. *Andros v. Wickens* (1865), 4 F. & F. 291.

5. *Reid's Emporium v. Brett* (1927), 44 T. L. R. 194, H. L. (2).

6. *Bilbee v. Hass* (1889), 5 T. L. R. 671; *Salomon v. Brownfeld* (1896), 12 T. L. R. 289; *Robey v. Arnold* (1897), 14 T. L. R. 2.

held that the commission continued to be payable to the agent's executors after his death.¹ But, apart from express stipulation, the general rule is that a principal is not liable to pay commission upon orders sent by his agent's customers after the agent has ceased to represent him.²

An agent, employed to sell property on commission, is not entitled to commission upon a sale to himself, without express agreement to that effect.³

Agent must have done what he was employed to do.

The agent must prove that he has done what he was employed to do before he is entitled to be paid. If he was employed to get money on certain terms, it is not sufficient for him to prove he has got the money; he must also prove that he has got it on the terms he was employed to get it, or that the principal accepted the new terms.⁴ If he is employed to procure a house, the title of which shall be approved by his principal's solicitor, he must prove that such approval has been given, or else that no reasonable solicitor would refuse the title,⁵ and if he proves this he is entitled to his full commission.⁶ If he is employed to procure a partner, he must prove that he has procured a person ready and willing to be a partner.⁷ If the remuneration agreed upon by an express contract is that if a certain thing is done a certain definite sum by way of remuneration will be paid, then if another thing is done no remuneration is due. Thus, where a principal contracted to pay 750 l., if his property was bought for 17,000 l., and he was obliged to take 8,000 l., of the price in the debentures of the company which bought his property, it was held that the commission had not been earned.⁸ So where the principal agreed to give the agents a commission if they promoted the sale of mines through the formation of a company of Messrs. Redfern, the commission was not earned when the company was formed through another person.⁹

Work must be done in reasonable time.

If the contract of employment between the principal and agent fixes no time within which the work shall be done, it must be done within a reasonable time. It was therefore held that where, in the month of February, 1883, the owner of a public-house had agreed to pay the plaintiff a commission on the valuation of his stock-in-trade upon his sub-letting it "at any future date", the plaintiff was not entitled to his commission when the house was sold in November, 1884, and not through his intervention.¹⁰

Agent must have acted as agent to entitle him to remuneration.

An agent is a person employed by the principal to bring him into legal relations with a third party. Therefore the

1. *Wilson v. Harper* (1908) 2 Ch. 370; *Levy v. Goldhill* (1917), 2 Ch. 297, *Cop Cramb v. Goodwin* (1919), 35 T. L. R. 477, C. A.
2. *Naylor v. Yearsley* (1860), 2 F. & F. 41, *Wares v. Brimsdown Lead Co.* (1910), 103 L. T. 429; *Salas v. Crisp* (1913), 29 T. L. R. 491; *Marshall v. Glanville* (1917) 2 K. B. 87.
3. *Hecken v. Waller* (1924), 39 Com. Cas. 296.
4. *Mason v. Clifton* (1863), 3 F. & F. 899.
5. *Clack v. Wood*, (1862), 9 Q. B. D. 276.
6. *Roberts v. Barnard* (1884), 1 Cal. & El. 336.
7. *Martin v. Tucker* (1884), 1 Times, 655; *Harru v. Patherick* (1878), 39 L. T. (N. S.) 543.
8. *Battams v. Tompkins* (1892) 8 Times, 707; (1923), 1 K. B. 110.
9. *Sewell v. Pulido Mining Co.*, (1896) 12 Times, 449.
10. *Houghton v. Orgar* (1884), 1 Times, 653.

agent must prove that he has brought his principal into such relations, and he must "make a contract on which the principal can sue," and if he does not prove this, he has not earned his commission. For example, a metal broker who was employed to get iron "at a mouth", but not being able to get any himself bought iron for cash and made a price to his principal, he was held not entitled to commission.¹

The agent must have done the work as work. For instance, if an agent who has been employed either to sell a ship or let a house, introduces his principal, not in the way of business, but over a dinner-table, or for some other purpose outside the agency, to save one who eventually comes to terms with the principal, no commission will be due.²

Work must have been done as work in the agency.

An agent to be entitled to commission must genuinely do the work he is engaged to do. It is not sufficient for him to prove that he has been the means of finding someone who has done the work, and that he has allowed such other person, who may have had no interest in doing it properly, to do it. Thus, an agent was held not entitled to commission under the following circumstances. He had been employed to sell shares in a bank, and to do so advertised them. The bank seeing the advertisement, and wishing to prevent their shares being advertised, offered to procure a purchaser. The agent accepted the offer, and the bank obtained a purchaser. The court considered that the agent was employed to get the best price; the bank had no such interest, and that the agent had therefore done nothing to entitle him to be paid.³

Agent must have done work himself.

To prove his right to commission, the agent must show that he has substantially done the work. The work is not substantially done if done by another; unless the principal authorises the agent employing a sub-agent.⁴ It is not substantially done if when the agent has been employed to get an advance of money he has only obtained a person who is ready to negotiate as to advancing the money; there must be a readiness and willingness to go on with the loan according to the usual course of business in such a transaction.⁵ So in *Grogan v. Smith*,⁶ where the house agent had obtained a purchaser for a lease subject to the condition that the vendor (the principal) should pay the cost of assignment, which is not the usual practice, and which the vendor had not consented to, it was held that no commission was earned.

The work must be properly done. If a broker negotiates a charter-party he must make it in intelligible terms for if the terms are not clear his charge is made practically for introducing confusion, and leading the parties into law suits; the question for the Court in such cases is whether the principal has derived

Work must be properly done to earn commission.

1. *Mollett v. Robinson* (1874), L. R. 7 H. L. 802; *May v. Angelis* (1897), 18 Times, 568.
2. *Service v. Bain* (1892), 5 Times, 65, (as to stockbroker) *Shelton v. Wood* (1891), 71 L. T. 814.
3. See *Barnett v. Isaacson* (1887), 4 Times, 645 cited at p. 425.
4. *Beale v. Dickerson* (1884), 1 Times, 654.
5. *Wilkinson v. Martin*, (1837), 8 C. & P. 1.
6. *Re Sovereign Assurance Co., Seller's Claim* (1891), 7 Times, 602.
7. (1890), 7 Times, 132.

advantage from the acts of the agent, or whether the work, through the careless or negligent way in which it has been done, is useless.¹ If the work is useless through his carelessness, the agent is entitled to no remuneration.²

Mere taking trouble does not entitle agent to remuneration.

The mere fact of incurring trouble, while the work has been useless through the agent's want of skill or negligence, does not make it a subject-matter for remuneration, which word implies that it is a reward for useful labour. If there is any doubt as to its usefulness, or that it was necessary for accomplishing the principal's object, that is a question for the jury.³

Nor is the agent entitled to remuneration if he has neglected his work. Thus, where a land agent, whose duty it was to look after a property, and who was paid by a commission on the rents, neglected the management, he was held not entitled to commission on the 720 l. he had collected.⁴

Principal not bound to accept disadvantageous terms.

The principal is not liable to pay commission if he has refused a charter because its terms were unfair.⁵ Chief Justice Tindal in that case said: "If the defendant was right in rescinding the contract, that will be an answer also to the claim for expenses. The question, therefore, will be whether, when the charter-party was presented to him for signature, he had a justifiable cause for refusing to sign it, saying, 'that is not the contract I was entitled to expect', for if he had then the plaintiff cannot recover, even for the expenses".

Remuneration may be payable even though the principal acquires no benefit.

Subject to any express agreement or special custom, where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquire no benefit from his services, or the transaction in respect of which the remuneration is claimed fall through, provided that it does not fall through in consequence of any act or default of the agent.⁶

In *Fisher v. Drewett*,⁷ A employed B to procure a loan, and entered into the following agreement: "In the event of your obtaining me the sum of £2,000, or such other sum as I shall accept, I agree to pay you a commission of 2½ per cent. on the amount received". B introduced A to building society, who offered to lend £1,625 upon terms which were accepted by A. The transaction afterwards went off because A would not satisfy certain requirements of the society, and failed to show a sufficient title to the property upon which the loan was to

1. *Hamond v. Holiday*, (1824) 1 Car. & Pay. 364; as to auctioneer doing work badly, see *Pearce v. Corf* (1879), L. R. 9 Q. B. 210.
2. *Bracey v. Carter* (1840), 12 A. & E. 373; (solicitor); *Denno v. Dawrall* (1812), 3 Camp 451 (auctioneer); *Money Penny v. Hartland* (1824), 1 C. & P. 352 (architect surveyor).
3. *Ell v. Fetherstonhaugh* (1831), 7 Bing. 669; *Shaw v. Arden* (1832), 3 Bing. 287.
4. *Palmer v. Godwin* (1862), 13 Ir. Ch. Reports, 171.
5. *Dalton v. Irwin* (1830) 4 C. & P. 269. See also *Read v. Rann* (1830), 10 B. & C. 438.
6. *Bowstead*, Art. 66, p. 149.
7. (1879), 48 L. J. Ex. 32, C. A. *Camp. Satter's Claim* (1891), 7 T. L. R. 502; *Fracock v. Freeman* (1883), 4 T. L. R. 541, C. A.

have been made. Held, that B was entitled to his commission of 2½ per cent. upon £1,625, the amount the society offered to advance.

An agent who was employed to borrow a certain sum upon leasehold security, found a person able and willing to lend that sum, but the transaction fell through in consequence of unusual covenants of which the agent had no knowledge. Held, that he was entitled to the whole of the agreed commission for procuring the loan.¹ In such cases if the agent employed to negotiate a loan brings the parties together and there remains nothing more for him to do, he is entitled to his commission even if the contract afterwards falls through without any default of the principal.²

A employed B, an estate agent, to find a purchaser for A's property and agreed to pay commission on a sale being effected. B introduced C, who signed a contract to purchase but did not complete the purchase. Held, that B could not recover the commission, unless he could prove that C was able and willing to complete the purchase.³ So, where an agent introduced a person who made an offer which was accepted subject to a deposit being made within a certain time and the deposit was not paid within the time, it was held that no commission was due.⁴

Where it was agreed that an agent should receive commission upon "all goods bought through him", and he obtained an order for goods which the principal accepted but was unable to execute so that no benefit accrued to him therefrom, it was held that the agent was entitled to his commission nevertheless.⁵ In such cases as a general rule the agent is entitled to his commission whenever he procures binding bargain which the principal accepts. But the agent has no such right unless and until the contract is complete and binding.⁶

A promised to pay B £5 if he should succeed in obtaining a purchaser for a lease at a certain price. B introduced C, who entered into a contract with A, and paid a deposit. C was unable to complete the purchase, and A permitted the contract to be cancelled, A retaining the deposit. Held, that B had substantially performed his undertaking, and was entitled to payment of the £5 promised.⁷ So, where property was sold at an auction to a purchaser who signed a contract and paid a deposit, but the contract was afterwards rescinded by the vendor in

1. *Green v. Lucas* (1876), 38 L. T. 584, see also 7 O. W. N. 297

2. *Fuller v. Evans* (1892), 9 T. L. R. 279; per Bramwell L. J. in *Fisher v. Drennell*, 48 L. J. Ex. 32 C. A.; *Passingham v. King* (1898), 14 T. L. R. 392, C. A.

3. *Martin v. Perry*, (1931), 2 K. B. 310; *James v. Smith* (1921), 1931 2 K. B. 317 n., *Chapman v. Winson* (1904) 91 L. T. 17, C. A.

4. *Mason v. Mazley*, (1936), 1 All. E. R. 64.

5. *Lockwood v. Leitch* (1860), 29 L. J. O. P. 340; *Hill v. Kitching* (1846), 15 L. J. C. P. 261; *Harris v. Petherick* (1878), 39 L. T. 348; *Vulcan Car Agency v. Fiat Motors* (1915), 32 T. L. R. 73.

6. *Grogan v. Smith* (1890), 7 T. L. R. 122, C. A.

7. *Harford v. Wilson* (1807), 1 Taunt. 12; *Lara v. Hill* (1868), 15 C. B. (N. S.) 46; *Flint v. Deppes* (1893) 9 T. L. R. 124; *Passingham v. King* (1898), 14 T. L. R. 392, C. A.

consequence of a requisition by the purchaser with which the vendor could not comply.¹

An agent was employed on commission to purchase certain property. He purchased the property, subject to his principal's solicitor's approval of the title. The principal broke off the transaction, and the title was never submitted to his solicitor. Held, that in order to maintain an action for the commission, the agent ought to show either that the principal's solicitor approved the title, or that such a title was submitted to him as he could not reasonably disapprove, and that unless the agent could prove that the seller had a good title, he could not recover the commission.²

A promised to pay B 2½ per cent. commission in the event of his finding a purchaser of certain land at the price of £3,000. B introduced C, who took a lease for 1,000 years at a yearly rent of £150, with an option to purchase the land, within twenty years, for £3,000. Held, that B had practically found a purchaser, and was therefore entitled to the commission.³

Where an agent was to receive his commission for the sale of an advowson when the abstract of conveyance was drawn out, but negotiations failed before the delivery of such abstract it was held that the agent was not entitled to the commission although he found out the purchaser who entered into a contract, as the event on which he was to be paid did not happen.⁴ So, where it was agreed that commission should be paid, "upon the sum which might be obtained", it was held that it could not be recovered until the principal had actually received the amount.⁵ So, if there be a trade custom whereby the agent is not entitled to commission unless the transaction in respect of which it is claimed be completed, he cannot recover the commission until completion, even if the transaction fall through in consequence of the principal's default.⁶

It has been held under the English law that an undertaking by a solicitor to conduct a suit constitutes an entire contract, and he cannot maintain an action for the costs, nor does the Statute of Limitations commence to run against him, until the termination of the suit, except where he is discharged, or his retainer is repudiated, by the client;⁷ or where the client

1. *Skinner v. Andrews* (1910), 26 T. L. R. 340, C. A.

2. *Clack v. Wood* (1882), 9 Q. B. D. 276, C. A.

3. *Rimmer v. Knowles* (1874), 30 L. T. 496, but see *Mote v. Gould* (1934), 152 L. T. 347.

4. *Alder v. Boyle* (1847), 16 L. J. C. P. 232; *Lott v. Oughtwatts* (1893), 10 T. L. R. 76, C. A.; *Chapman v. Winson* (1904) 91 L. T. 17, C. A.; *Henry v. Gregory* (1905), 22 T. L. R. 53.

5. *Bull v. Price* (1831), 5 M. & P. 2; *Beningfield v. Kynaston* (1887), 5 T. L. R. 2 79, C. A.; *Martin v. Tucker* (1885), 1 T. L. R. 655; *Didcott v. Friesner* (1896), 11 T. L. R. 187, C. A.; *White v. Turnbull* (1898), 78 L. T. 726, C. A.; *Beale v. Bond* (1901) 84 L. T. 313, C. A.; *Foster's Agency v. Romaine* (1916), 32 T. L. R. 545, C. A.; *Knight v. Gordon*, (1923), 39 T. L. R. 399; *French v. Leaton Shipping Co.*, (1922) 1 A. C. 451; *Price v. Smith*, (1929), 141 L. T. 490, C. A.

6. *Reed v. Bann* (1830) 10 B. & C. 438; *Broad v. Thomas* (1830), 7 Bing. 99.

7. *Whitehead v. Lord* (1852), 7 Ex. 691; *Harris v. Quine* (1869), L. R. 4 Q. B. 653; *Underwood v. Lewis*, (1894), 2 Q. B. 306.

8. *Hawkes v. Cottrell* (1858), 27 L. J. Ex. 369.

refuse to put him in funds for out-of-pocket expenses.¹ But the principle of entire contract does not apply to such a matter as a bankruptcy or winding-up, or an administration², nor where the solicitor is retained to prosecute various proceedings.³

If a principal chooses to accept the contract which the agent has procured for him, he cannot refuse to pay commission because the contract afterwards goes off or is not advantageous to him. Thus, in *Moir v. Marten*,⁴ where agents were employed to secure a company being underwritten, it was held that the principal having once accepted the services of the proposed underwriting brokers, could not afterwards refuse to pay commission on the ground that some of them were men of straw and unable to carry out their undertaking. To avoid the contract, the principal would have to make out a case of fraud on the agent's part.

Where a principal in November employed an agent to obtain a purchaser for the lease of his house, and the agent obtained one in the following January, who wished to have possession on the 15th March, the agent was held entitled to his commission though the principal did not sell the lease, owing to his refusal to give up possession at the time, the Court holding it unreasonable to refuse possession at that time. No time for performance of the subject-matter of the agency had been mentioned, and in the absence of any such stipulation the Court implied a reasonable time.⁵

A principal may contract so as only to make himself liable for remuneration if the agent's work is useful to him. Thus, in *Lara v. Hill*⁶, the principal arranged with the agent, who was to procure a purchaser for some property, that he was only to pay when the purchase-money was received; the agent was, therefore, not held entitled to commission until he could prove the money had been received. In England, the rule as to shipbrokers is that commission is payable on the Charter being accepted⁷, but sometimes it is arranged that Commission should only be payable on the hire earned;⁸ or, as in *Caine v. Horsefall*⁹, where the commission was made only payable on the net proceeds of the cargo after deducting terminal charges, it was held that commission was only payable on the sum actually realised after deducting bad debts and other charges. And when the principal has stipulated that he would pay commission on completion of the purchase, he is only liable when he has actually received the money, and not on his conveying the property on different terms which may not have been so advantageous¹⁰, though of course he cannot colourably

Special contract making remuneration only payable if agent's services profitable to principal.

1. *Wadsworth v. Marshall* (1832), 2 Cr & J 865.
2. *Re Hall and Barker* (1878) 9 Ch D 538.
3. *Warmingtons v. McMurray* (1937), 81 S J. 178, C. A.
4. (1891), 8 Times, 830.
5. *Noon v. Auerbach* (1898), 79 L. T. 413.
6. 15 C. B. N. S. 45; so also in *Alder v. Boyle*, (1847), 4 C. P. 636, where commission only made payable on abstract being drawn out.
See also (1923) 1 K. B. 110.
7. *Hill v. Kitching* (1846), 3 C. B. 299.
8. *White v. Turnbull, Martin & Co.*, (1897), 14 Times, 48; 75 L. T. 728.
9. (1869), 1 Ex. 519.
10. *Battams v. Tompkins* (1899), 8 Times, 707.

after the terms so as to avoid paying the agent.¹ So in the case of a music-hall artists, where the agreement provided that commission should be paid on "all monies accruing from engagements". There the artists did not perform at the music-hall at all, and so money became due to them. The court held that consequently no commission was due by them to the agents. Lord Esher pointed out that the words were not "which might have accrued due but for the default of the defendants."²

So in the case of a loan, the principal can of course stipulate that if the loan does not go through, the agent is to be paid nothing. Thus, where the principal contracted as follows: "In the event of our not carrying the business through, then you are to have no claim against us of any kind whatsoever", the Court held that the agent was entitled to nothing, as the principal had not got any of the money.³

So in *Bull v. Price*⁴, where a principal agreed to pay an agent two per cent. on money obtained on the sale of his property, when, owing to a flaw in his title, the money could not be paid until a third person joined in the conveyance, the agent was held only entitled to his commission when the principal had actually received the money.

When agent's
remuneration
becomes due

In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

(S. 219, *Indian Contract Act*, 1872).

As already observed, where the parties have made an express contract for remuneration, the condition under which it becomes payable must be ascertained by a reference to the terms of that contract and no implied contract can be set up to add to or deviate from the original contract, though it can be interpreted by a reference to custom not inconsistent with it.⁵ And so long as the agency subsists, the principal remains under his contractual obligation to pay the commission in terms of the agreement which creates mutual rights and obligations of a continuing nature, in spite of all shortcomings of the agent in the discharge of his duties under the agreement.⁶ Also, in order to entitle the agent to receive his remuneration, he must have carried out that which he bargained to do, or at any rate must have substantially done so, and all conditions imposed by the contract must have been fulfilled. He is not, however, deprived of his right to remuneration, where he has done all he undertook to do, by the fact that the transaction

1. *Bimmer v. Knapples* (1874), 80 L. T. 496.

2. *Dillcott v. Friesner* (1895), 11 Times, 187.

3. *Malcolm v. Armstrong* (1896), 12 Times, 167.

4. *Bull v. Price*, 7 Bing 287.

5. *Satchidanand v. Nriyaya Nath*, 1924 Cal. 517=50 Cal. 878=79 I. C. 287=27 C. W. N. 1007, English cases referred to; *Kishan Prasad v. Purnendu*, 16 C. W. N. 753; *Andley Bros. v. McReady*, 1928 Lab. 605=111 L. C. 99.

6. *Boulton Bros. v. New Victoria Mills*, 1920 All. 87=119 L. C. 637.

is not beneficial to the principal, or that it has subsequently fallen through whether by some act or default of the principal or otherwise, unless there is a provision of the contract, express or implied, to that effect, or unless the agent was himself the cause of his services being abortive; nor does he necessarily lose his right to remuneration through making a *bona fide* mistake, even if it amounts to a breach of a duty.¹ In such cases when the commission falls through no question of *quantum meruit* arises.² The current of modern opinion is to the effect that those who bargain to receive commission for introductions have a right to their commission as soon as they have completed their part of the bargain, irrespective of what may take place subsequently between the parties³, though in each case the nature of the contract must be carefully considered⁴.

An act of an agent is complete as soon as he has done everything in respect thereof which he is required to do for the due discharge of his duties as such⁵. For instance, where an agent is employed to procure a loan his act is complete as soon as he has introduced to his principal a creditor who is able and willing to lend the sum required on the terms prescribed by the principal and if the negotiations afterwards fall through because the principal could not satisfy the creditor or his solicitor as to his title to the property which was to be given as security for the loan, the agent's right to his remuneration is not lost by such failure.⁶ The main office of a loan broker is to bring together the borrower and the lender who is willing to open negotiations on a reasonable basis, and when he has done that, he has done all that is necessary for him to do and earn his commission⁷.

In the absence of any special stipulation, an agent, in order to found a claim for his bonus or commission in selling or letting a house, must show that such sale or lease was the direct result of his intervention and was obtained by means of his agency or some sub-agent of his; it is not sufficient for him to show that such lease or sale was obtained indirectly as a remote

Agent for
sale-brokers.

1. Halsbury, Vol. I, 2nd Edn., para 433, p. 258 and the authorities cited therein. The subject has already been dealt with at length previously. See also *Laljee v. Dadabhai*, 23 Cal. L. J., 190, 195.
2. *Andley Bros., v. McReady*, 1928 Lab. 605=111 I. C. 99.
3. *Fisher v. Drewett*, 48 L. J. Ex 82; see also *Shethk Farid v. Hargulal*, 1937 All. 48=166 I. C. 631, sale fell through owing to default of purchaser.
4. *Stokes v. Soondernath*, 22 Bom. 540, 546.
5. *Mortyrose v. Gourjon*, 15 Cal. L. J. 812, *Krishna Prasad Singh v. Purnendu Sinha*, 16 C. W. N. 753; *Gobind Chandra v. Ellice*, 30 Cal 202; *Annavamby Iyer v. Zamindar of Ayakudi*, 8 M. L. T. 40.
6. *Gobind Chandra v. Ellice*, 30 Cal 202; *Vasanji v. Karson*, 1928 Bom. 270=109 I. C. 716=52 Bom 627; But where the agent procures a loan on certain conditions not assented to by the principal, he is not entitled to any commission. *Krishna prashad Sinha v. Purnendu Sinha*, 16 C. W. N. 753. So where the loan procured is less than the full amount for the procurement of which the agent was employed, he is not entitled to the full commission, but only according to Aikman J., to the proportionate amount of it, while, according to Hanerji J., only to a reasonable compensation for his labours. *Shepurji (Seth) v. Sheoraj Singh*, 1899 A. W. N. 68. The view of Aikman J., was accepted in the Letters Patent Appeal as correct. 1900 A. W. N. 43.
7. *Vasanji v. Karson*, 1928 Bom. 170; *Jwala Prasad v. Bachcha Ram*, 30 I. C. 223.

casual consequence of his efforts.¹ A broker commissioned to find out a purchaser must procure a willing and able purchaser to earn his commission². But the broker is entitled to the agreed commission when he finds a purchaser and the sale has actually taken place in his favour even though the negotiations or completion of the sale between the buyer and the seller may not have taken place through the direct intervention of the broker³. The principal cannot by employing another broker in the midst of negotiations, however innocently, deprive the broker who brought the parties together of his commission⁴. So a broker is entitled to his commission if the relation of buyer and seller is really brought about by him, although the actual sale has not been effected by him⁵.

In the absence of a specific agreement, a broker engaged to purchase a house for his principal is entitled to his brokerage only on completion of the deed of conveyance.⁶

A broker to secure a purchaser at a stated price and within a certain time would be entitled to his commission if he finds a purchaser within that time who is ready and willing to purchase at the stated price⁷. The broker must, however, prove either that the transaction has been completed, or that, if it is not, the non-completion was due to the default on the part of the principal.⁸ So, an agent employed for sale of property is entitled to claim reasonable remuneration for his work and labour, time, trouble and expense when he obtained a purchaser with whom the principal came to a substantial understanding regarding the terms, but the principal withdrew from that arrangement and eventually sold the property to another purchaser at a considerably enhanced price⁹.

Full brokerage is payable though the transaction falls through when the vendor takes the negotiations out of the broker's hands¹⁰. On the same principle, a broker who arranges for the sale of a mortgaged property is entitled to his commission even though the sale falls through owing to the inability of the vendor mortgagor to complete the contract of sale on account of the non-production of the title deeds by his mortgagee.¹¹ Where an agent brings about a sale, and the sale goes off through the caprice of the vendor, the agent is entitled to his commission, whether it is to be treated as already earned when once a completed contact for sale is made, or whether it is to be considered as damages for breach of contract by the principal.

- 1 *Jordan v. Ram Chandra*, 8 C. W. N. 831; *Liladhar v. Mathuradas*, 1934 Bom 158, *Andley Bros. v. McCready* 1928 Lah 605
- 2 *Fourcar & Co. v. Mudaltar*, 1924 Rang 232 = 99 I. C. 750
- 3 *Roopji & Sons v. Dyer Meaken*, 1930 All 545 = 124 I. C. 35
- 4 *Wilkinson v. Martin*, (1837) 8 C. & P. 1.
- 5 *The Municipal Corporation of Bombay v. Ouwry*, 20 Bom 124; *Liladhar v. Mathuradas*, 1934 Bom 158
- 6 *Sunderdas Ghanshamdas v. Tara Singh Prem Singh*, A. I. R. 1944 Sind. 168, 1924 Rang 232 and 1924 Mad 212 approved.
- 7 *Lallies Mohammad v. Dadabhai Jivanji*, 29 Cal. L. J. 190
- 8 *Makta v. Cassimbhai Keshaji*, 1922 Bom. 453 = 24 Bom. L. R. 847 = 75 I. C. 198; *Liladhar v. Mathuradas*, 1934 Bom 158.
- 9 *Martynoss v. Courjon*, 15 Cal. L. J. 812
- 10 *Fourcar & Co. v. Mudaltar*, 1924 Rang 232.
- 11 *Makta v. Cassimbhai*, 1922 Bom. 453.

pat that he would carry through the sale, so as to enable the agent to earn his commission if he brought about the contract¹. Where a person is proved to have acted as a broker, he is entitled to a reasonable commission even if he fails to prove the rate of commission².

Further, a broker is entitled to his commission when he has induced in the vendor the contracting mind, the willingness to open negotiations upon a reasonable basis even though a change in the terms of the contract is made between the buyer and the seller without his intervention³. But if the negotiations carried on by the broker have completely ceased and have been abandoned at the time, his employment as a broker has ceased, the agency of the broker ceases too, and with it his right to claim remuneration. The test in such cases is whether the work of the broker who claims brokerage is the effective or efficient cause of the completion of the transaction.⁴ And where commission was payable out of the price realized on sale, the commission is not payable when the agent concluded the contract of sale but when the vendor actually obtained the purchase-money or at any rate not before the agent had removed all the obstacles to the vendor's receiving the amount⁵.

Under the English law also, in the case of an estate agent, it has been established that, in certain cases, the agent when contracting with the actual vendor may claim his commission if he has found a person willing to purchase at the stated price although that purchaser does not in fact complete the transaction. The decision, as in all such cases, is based upon the construction of the actual contract made, but, apart from some special term, the normal contract will be restricted to the case where the person introduced completes the purchase. In *Luxor v. Cooper*⁶ the appellants were private companies and were the free-holders of the Luxor Cinema at East-bourne and the Regal Cinema at Hastings respectively. The board of directors of each of the appellant companies was composed of the same individuals and one *W. B.* who was the managing director of both companies, held the majority of the issued shares. On the death of *W. B.* on 11th September 1935 his son *H. B.* became a director in his place. Prior to his death *W. B.* in the summer of 1935 had asked the companies' auditor *E.* to get an offer for the purchase of the two cinemas and *E.* said that he would approach his "client" meaning thereby the respondent. *W. B.* was alleged to have said that *E.* would have a commission. After *W. B.*'s death another director *G.* told *E.*, after a directors' meeting, that the directors had decided to sell the cinemas and that *E.*'s client should make the offer through the companies' solicitor who had authority to deal with the matter. *E.* told the respondent of

1. *Annanam Iyer v. Zamindar of Ayakudi*, 8 M. L. T. 40.

2. *Khurshed v. Asa*, 1933 Lah. 784=146 I. C. 761.

3. *Municipal Corporation of Bombay v. Coverji*, 20 Bom. 124.

4. *Liladhar v. Mathuradas*, 1934 Bom. 158, *Burchell v. Gowie and Blackhouse Collieries, Ltd.* (1910) A. C. 614.

5. *Immudipattam v. Annaswamy*, 17 I. C. 106 (Mad.)

6. (1941) 1 All. E. R. 33 (H. L.)

this and the respondent shortly afterwards introduced to E a prospective purchaser willing to negotiate for the properties. E took the respondent to meet the company's solicitor. Ultimately on 11th October 1935 after negotiations the solicitor's firm replied to E confirming that on completion of the sale of the cinemas to the purchaser a procuration fee of £10,000 was to be paid to the respondent. At the directors' meeting held on 2nd October 1935 to consider the offer, H. B. opposed the motion accepting the offer. The sale was not proceeded with and the disposal of the cinemas ultimately took place by way of a sale of shares in the appellant companies to another party. In an action by the respondent for damages for not carrying through the sale, thereby preventing the respondent earning his commission, it was held, that upon a true construction of the contract the agent also takes the risk of the owner not being willing to conclude the bargain with the agent's nominee and the respondent's claim must fail, and that an implied term that the principal will not refuse to go on with the sale cannot be inferred and as no binding contract was made between vendor and purchaser, the agent was not entitled to the commission. In *Davis v. George Trollope & Sons*,¹ the plaintiff and defendants were estate agents. The plaintiff told the defendants that he might be able to introduce a purchaser for a house on their books. A contract was, therefore, made by which the defendants agreed to pay the plaintiff one-half of the sum they would earn if the plaintiff introduced to them a willing buyer for £4,250. The plaintiff accepted the offer of £4,250 on behalf of his client although he had no authority to go beyond £4,000, but at about the same time the house was sold through another purchaser at £4,250. It was argued for the plaintiff that the commission was payable if he introduced a person willing to buy even though a sale to that person was not effected. *Held*, that the share of the commission was payable to the plaintiff only if the sale of the house at £4,250 was effected through him and, since the acts of the plaintiff were not the effective cause of the sale, he was not entitled to any part of the commission.

In the absence of an express contract, the right to remuneration and conditions under which it is payable are held in English law, as already observed, to depend on the custom or usage of the particular business in which the agent is employed.² The same principle applies in India³. The words "special contract" in this section include a contract arising by implication from custom or usage.

Where the terms of remuneration are contained in a writing, the agent is not entitled to remuneration un-

1. (1943) 1 All. E. R. 501 (C.A.)

2. *Read v. Egan* (1880) 10 B. & C. 438; *Broad v. Thomas* (1880), Bing. 96 (custom of city of London by which shipbrokers entitled to commission only in the event of completion of contracts negotiated by them held to exclude any claim, even for quantum meruit, in respect of a contract not completed though the non-completion was owing to the act of the principal); *Baring v. Stanton* (1876) 9 Ch. D. 502.

3. *Satchidananda Dutt v. Nriya Nath Mitter*, (1928) 50 Cal. 878=79 I. C. 287; *Karunan Chettiar v. Chidambaram Chettiar*, A. I. R. 1938 Mad. 725=179 I. C. 226.

less all conditions imposed by the writing have been fulfilled.¹

Where the defendant gave authority to the plaintiff to negotiate a lease of the former's property on certain terms as to brokerage, the plaintiff is entitled to the agreed commission when, within the time specified, he finds a person who agrees to take the lease on the terms accepted though the lease was not executed owing to the inability on the part of the defendant to make out a title to the property.²

An office clerk on a monthly salary is not entitled to any salary for the broken portion of a month in the course of which he leaves his service without the consent of his employer.³

A life assurance company appointed D as its Chief agent for Gujarat. D was allowed to work in name of D & Co., with certain others as partners. On D's death his sons the plaintiffs were recognized as partners of D & Co., by the company. The Chief agents had to appoint sub-agents and canvassers, over them, and to see that they secured as much work as possible for the life assurance company, that renewal premiums were paid regularly and that the life policies once effected were duly kept alive. The company having terminated the chief agency by notice the plaintiffs claimed that they were entitled, even after the termination of the agency, to commission on renewal premiums on all policies effected by them and reliance was placed on the terms of the contract of agency the relevant portions of which were as follows:- "the premiums of persons assured through my agency (plaintiffs) should be always subject to my commission so long as they remained within the province of Gujarat whether the premiums be remitted through my offices or direct." Particular emphasis was laid on the word "always". It was further contended that even if there was no definite agreement to pay commission after termination of agency, the plaintiffs were entitled to commission as an implied term of the agreement. *Held* (per Stone C. J.,) that in the absence of a definite agreement, the commission payable to the agent by his principal ceased on the termination of the agency especially so if the payment was for services for when the services ceased the commission ceased also. As the commission was paid to the plaintiffs for services and not merely for the introduction of new policy-holders, the plaintiffs being required to perform numerous services which necessitated the upkeep of a large office and supervision of various canvassers, there was no continuation of the right to commission after the services were terminated. The terms relied upon did not constitute agreement to pay commission after termination of agency. (*Per Kania J*) that when a particular client was secured by the agent and it was from that introduction or that contract that the subsequent orders were received by the principal, without any further thing being done, the agent was entitled to the remuneration, even though the orders came after

Broker for negotiating lease.

Clerk's remuneration when services left without consent.

Life Assurance Companies Chief agent-agency terminated-right to agent to commission on future premiums of assured introduced by him

1. *Laljee Moomed v. Dadabhai*, (1916) 23 Cal. L. T. 190, 195; 84 L.C. 807.

2. *Rajin Nandan v. Madan Mohan*, 76 L.C. 898.

3. *Bull Bros v. Ambika Prasad*, T.L.R. 35 All. 182.

the termination of the agency. On the other hand, if in respect of the subsequent orders the canvasser had to do some work then the implied intention was that on the termination of employment the agent was not entitled to commission. As it was necessary for the plaintiffs to do work in respect of the renewal premia, there could not be an implied agreement to pay commission on such renewal premia after the termination of the agency. Nor could the plaintiffs claim the commission on the renewal premiums on the basis of a definite agreement as no such agreement could be spelt out of the terms of the contract of agency relied upon by the plaintiffs.¹

Damages for wrongfully preventing agent from earning remuneration.

The rule has been thus stated by Bowstead:²

"Where the principal, in breach of an express or implied contract with his agent, refuses to complete a transaction, or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover, by way of damages, the loss actually sustained by him as a natural and probable consequence of such breach of contract. The measure of damages, where nothing further remains to be done by the agent, is the full amount that he would have earned if the principal had duly completed the transaction or otherwise carried out his contract with the agent.

Where the authority of an agent is revoked by the principal, or the agency is otherwise determined, after it has been partially executed, or after the agent has endeavoured to execute it, the question whether the agent is entitled to any, and if so, to what remuneration for the work previously done, depends upon the nature and terms of his employment and the custom or usage of the particular business in which he is employed."

A employed B, an estate agent, to find a purchaser for certain property. B introduced C, with whom A agreed terms of purchase, subject to contract. A agreed to pay a commission to B in the event of the sale being completed. A written contract containing the agreed terms of purchase was prepared and was signed by C, who was able and willing to complete the purchase. A, without assigning any reason, refused to sign the contract or proceed with the sale. Held, that there was an implied term in the agreement between A and B that A would not, without just excuse, prevent B from earning his commission, and that, in the circumstances, B was entitled to damages equal to the amount of commission which he would have earned upon a sale.³ But where the authority of the

1. *Sohrabji Dhunibhoy v Oriental Govt. Security Life Assurance Co., Ltd.*, A I R 1944 Bom 166 - case - law discussed - where an agent introduces work to a commercial firm is he entitled to receive commission on the orders placed as the result of the introduction even after he ceases to be the agent of that commercial firm?
2. *Law of Agency*, Art. 67, p. 152. See also *Queen of Spain v Parr* (1868) 39 L. J. Ch. 73, *Simpson v Lumb* (1856), 17 C. B. 608. The agent must show that there was a contract express or implied, to pay remuneration in such a case. The burden of proof is on him. See, *Laladhar v. Mathuradas*, A. I. R. 1984 Bom. 158, where the law is fully discussed.
3. *Trollope v. Martyn* (1934) 2 K. B. 436. See also *Dudley v. Barnet*, (1937) 3 C. 692 *Oakhill v. Cowan* (1934), 78 S. J. 937.

agent is withdrawn before all terms of purchase have been agreed, damages must be estimated with reference to the probability that the parties would, but for such withdrawal, have agreed all the terms of purchase and entered into a binding contract.¹

In *Turner v. Goldsmith*² A contracted to employ B, and B to serve A, as agent for the sale of such goods as should be forwarded or submitted to B by sample from time to time, the agreement to be determined at the end of five years by notice from either party. Before the expiration of the five years, A's factory was burnt down, and the business was not resumed. In action by B for breach of contract, the Court of Appeal held that there was no implied condition that the contract should determine on the destruction of the factory, and that B was entitled to substantial damages.

A and B agreed, in consideration of the services and payments to be mutually rendered and made, that for seven years, or so long as A should continue business at L, A should be sole agent there for the sale of B's coals. About four years afterwards B sold his colliery. Held, that B was under no obligation to continue the business, but only to employ A as agent for the sale of such coals as he might send to L, and that the agency necessarily determined when the subject matter thereof was gone.³

In *French v. Leeston Shipping Co.*⁴, ship broker procured a time charter, upon the terms that they should be paid a commission on all hire earned under the charterparty. Before the end of the time provided for by the charterparty, the owners sold the vessel to the charterers and agreed to cancel the charterparty. Held, that there was no implied agreement that the owners would not so sell the vessel and cancel the charterparty, and that the ship brokers were not entitled to commission for any period after the cancellation, or to damages.

Similarly, in *Howard v. Manx Isles Steamship Co.*,⁵ ship-brokers negotiated, on behalf of the owners, a Charterparty containing an option for the Charterers to purchase the ship during the charter period, for £ 125,000. The owners agreed with the ship brokers that should the option be exercised, the brokerage on the purchase should be 3½ per cent. During the currency of the Charter, the owners sold the ship to the charterers for £ 65,000. Held, that the ship brokers were not entitled to commission, the option to purchase for £ 125,000 not having been exercised, and the ship brokers' negotiations not being the effective cause of the sale at £ 65,000; and that they could not recover upon a *quantum meruit*, in view of the express agreement.

1. *Trollope v. Coplan* (1886) 2 K B 382, *Bampton v. Garner*, (1887) 81 S. J 749.
2. (1891) 1 Q B 544. See also *Nieland v. Cuthbertson* (1891), 7 T L R 516, C. A., *Northey v. Trevillion* (1902), 7 Com. Cas. 201; *Warren v. Agdeeshman* 88 T L R 588.
3. *Rhodes v. Ferwood* (1876), 1 App. Cas. 256, *Bovine v. Dent* (1904), 21 T L R. 82, *Lazarus v. Cairn Lane* (1912), 106 L. T. 378.
4. (1922) 1 A C 451; See also *White v. Turnbull*, (1898), 78 L. T. 726, C. A.
5. (1928) 1 K B 110.

An agent was employed by an insurance company for a term of five years, at a fixed salary of £500 a year and a commission on the profits, the agent undertaking to transact no other business during the term. The company wound up voluntarily before the expiration of the term. Held, that the agent was not entitled to prove in the winding-up for prospective commission, the contract merely importing that a commission on the profits was to be paid if the company found it profitable to carry on the business, and chose to do so. Such a contract gives the agent no right to insist upon the business being carried on.¹

But in *Re Patent Floor Cloth Co., Dean and Gilbert's Claim*,² A was engaged for a fixed term by a company as a traveller, and it was agreed that he should receive by way of remuneration a commission upon all orders obtained, but no salary. After A had established a connection, and before the expiration of the term for which he was engaged the company wound up voluntarily. Held, that A was entitled to recover damages for the loss of the commission that he would have earned during the remainder of the term. It was pointed out that, had the case been otherwise decided, the company might have immediately commenced business again, and so obtained the benefit of A's connection without paying for it.

It is not easy to reconcile the previous two decisions quoted above, and it would seem that each case must depend upon the presumed intention of the parties to be ascertained from the particular circumstances.

A company employed a broker to dispose of its shares, and agreed to pay him £100 down, and a further £400 on the allotment of all the shares. The broker disposed of a considerable number of the shares, and then the company was voluntarily wound up. Held, that the broker was prevented earning the £400 by the act of the company, and was entitled to recover such damages for the breach of contract as the jury thought reasonable. The jury awarded him £250.³

A firm agreed to employ an agent for a specified term. During the term, one of the partners died. Held, that the parties contracted with reference to the existing partnership, subject to an implied condition that all the parties should so long live, and that, therefore, the agent was not entitled to damages from the other partners for refusing to continue the employment.⁴ Otherwise, if the partnership had been dissolved by agreement.⁵

In *Re London and Scottish Bank, ex p. Logan*,⁶ the articles of association of a company provided that in the event of the

1. *English and Scottish Marine Insurance Co., ex p. Macfure* (1870) 1 L. R. 5 Ch. 787; See also *Re Newman, Raphael's Claim*, (1918) 2 Ch. 809.
2. (1872), 41 L. J. Ch. 476. See also *Re London and Colonial Co., ex p. Clark* (1889), L. R. 7 Eq. 550; *Ratgate v. Union Manufg. Co.*, (1918) 1 K. R. 592.
3. *Inchbald v. Western Nalgherry Coffas, etc., Co.*, (1864), 34 L. J. C. P. 15.
4. *Tasbar v. Shepherd* (1861) 20 L. J. Ex. 207. Comp. *Phillips v. Hull Alhambra*, (1901) 1 K. R. 59.
5. *Brace v. Coldar* (1895) 2 Q. B. 258; But see *Bovins v. Dent* (1904) 21 T. L. R. 52.
6. (1870) L. R. 9 Eq. 149. See also *Re Dale and Plant* (1890), 6 T. L. R. 123, as to the right of a managing director to prove in such a case.

manager being dismissed for any cause other than gross misconduct, he should be paid a certain sum by way of compensation. Held, that he was entitled to prove for such sum in the winding-up of the company.

An agent was employed to sell an advowson. Before he succeeded in finding a purchaser, the principal sold it privately. Held, in an action for wrongful revocation of authority, that the agent was not entitled to recover anything, in the absence of evidence of expense incurred by him.¹ Where the authority of an agent for sale is revoked before a sale is effected, the question whether he has a right to remuneration for what he has done in trying to effect a sale depends upon the terms of his employment. Unless there is an express contract to pay the agent remuneration for his trouble, or the circumstances are such as to show that that was the intention of the parties, he is not entitled to recover in such a case; at all events, without proof of damages¹.

An owner of property appointed estate agents "sole agents for the sale of the property". He sold the property himself without the intervention of an agent. Held, that the estate agent was not entitled to commission or damages.² But where the defendants appointed the plaintiff "sole agent for the sale of their goods" in a certain district, it was held that they were not entitled to sell in that district except through his agency.³

In *Prickett v. Badger*,⁴ where a principal employed an agent to find a purchaser at a fixed price and promised to pay him a commission in the event of a sale being effected, but when the agent found out a purchaser at such price, he refused to complete the transaction. The agent was held entitled to recover the full amount which he would have received if the transaction had been completed.

The rule stated on page *supra*, however, does not apply if there is a special custom whereby the agent is entitled to remuneration only in the event of the transaction being completed⁵. In order that such custom may be deemed reasonable it is necessary that the rate of remuneration should be higher than would fairly compensate the agent for the services rendered by him.⁵

No agent can recover any remuneration for his services unless at the time when the services were rendered he was legally qualified to act in the capacity in which he claims the remuneration⁶. Thus, it has been held under the English law that a solicitor cannot maintain an action for costs unless his certificate was in force at the time when the work for which

No remuneration in respect of unlawful or wagering transactions.

1 *Simpson v. Lamb* (1856), 17 C B 608, *Nyah v. Owen*, (1886), 2 T L R 864, *C A. Brinson v Davies*, (1911), 105 L T. 184

2 *Bentall v Vicary*, (1981), 1 K B 253

3 *Snodgrove v Ellingham Colliery Co*, (1881), 45 J, P 408 See also *Lamb v. Goring Brick Co*, (1982), 1 K B 710 where "sole selling agents" were held not to be agents, but buyers, with the sole right to sell the goods of the manufacturers.

4 1 C B. N. S. 296.

5 *Broad v. Thomas* 7 Bing 99; *Read v. Kann*, 10 B & C 488; *Harley v Nagata*, 84 T. L. R. 124.

6 *Bowstead*, Art 68, p. 157.

the costs are claimed was done'. So also a broker¹ or appraiser² cannot maintain any action for commission or remuneration as such, unless he was duly licensed to act in that capacity.

It has been further held under the English law that no agent can recover any remuneration in respect of any transaction which is obviously, or to his knowledge, unlawful, or in respect of any gaming or wagering contract or agreement rendered null and void by the Gaming Act, 1845, or of any services in relation thereto or connection therewith'. An action was brought for work performed and money expended in buying shares in a company which affected to act as a body corporate without authority by charter or statute, and, was, therefore, illegal. Held, that the action was not maintainable, because it arose out of an unlawful transaction'. So, a broker cannot recover commission for affecting a contract of marine insurance which is not contained in a duly stamped policy³, or for effecting any illegal insurance⁴, or in respect of an illegal sale of offices⁵. An agreement to pay remuneration is void'. So, a stockbroker cannot recover commission or brokerage in respect of a purchase or sale of stock or shares, unless he sends the principal a duly stamped contract note'. In *Knight v. Fitch*,¹⁰ commission was claimed by a broker for procuring freight. Held, that the fact that the charter-party, in respect of which the commission was claimed, would be illegal unless the charterer obtained certain licenses, was no answer to the action, it not being part of the broker's duty to see that the licenses were obtained.

In India section 30 of the Indian Contract Act, 1872, represents the whole law of wagering contracts in force in British India, supplemented in the Bombay Presidency by the Act for Avoiding Wagers (Amendment) Act, 1865.¹¹

Again, it has been held under the English law¹² that no agent is entitled to remuneration -

- (a) in respect of any unauthorised transaction not ratified by the principal;
- (b) in respect of any transaction entered into by him in violation of the duties arising from the fiduciary

to remuneration in cases of misconduct or breach of duty.

1. *Re Brunswick and Cronl* (1849) 4 Ex. 492, *Re Sweeting* (1898), 1 Ch. 268. As to disbursements, see *Kent v. Ward* (1894), 70 L. T. 612, C. A.
2. *Cope v. Rowlands*, 2 M. & W. 149.
3. *Palk v. Forster*, (1848) 12 Q. B. 666.
4. *Bowstead*, Art. 68, p. 157.
5. *Joseph v. Pebrer* (1825), 3 B. & C. 689.
6. Stamp Act, 1891 (54 & 55 Vict. C. 39), ss. 95, 97.
7. *Allkins v. Jupp* (1877), 2 C. P. D. 375.
8. *Starkpole v. Erie* (1761), 2 Wils., 188.
9. Finance (1909-10) Act, 1910, 110 Edw. 7 C. 8. s. 78 (3) *Leahey v. Bracken*, (1894) 1 Q. B. 114 is not now law.
10. (1855), 24 L. J. C. P. 122.
11. See notes under S. 30 of Pollock & Mulla's Indian Contract Act, 7th Edn., pp. 215 to 224.
12. See *Bowstead*, Art. 69, p. 158, and the authorities cited therein. See also *Story on Agency*, ss. 381-384, 349. Negligence may disentitle an agent to recover even advances and disbursements out of pocket.

character of the relationship between him and the principal, even if the transaction be adopted by the principal;

- (c) where he has been guilty of wilful breach of duty or misconduct in the course of the agency; or
- (d) where the principal derives no benefit from his services, in consequence of his negligence or other breach of duty.

So, where an agent was employed to procure a loan upon certain terms, but before anything was done by him the principal varied the terms and the agent failing to procure the loan on the varied terms, procured it on the original terms which the principal refused to accept, it was held that he was not entitled to any commission¹. Similarly, where an agent was employed to sell certain property, but his authority was revoked by the death of the principal and he subsequently sold the property, the sale being confirmed by the principal's executors, it was held that the agent was not entitled to the agreed commission from the executors, unless they ratified also the terms of his employment but he might be entitled to a *quantum meruit* for his labours.² So where an agent, who was employed to sell certain land, sold it to a company in which he was a director and large share-holder, it was held that he was not entitled to the commission even if the principal adopted and confirmed the sale³. So, if an agent for sale fraudulently takes a secret commission from the purchaser, he is not only accountable to the principal for such secret commission, but is also not entitled to any remuneration from him, and if he pays him commission in ignorance of the facts, he is entitled to recover it back again⁴. If a solicitor, who has undertaken the conduct of a suit, abandons it without reasonable cause, or without giving his client reasonable notice of his intention to do so, he is not entitled to recover any costs, even for the work already done⁵. Nor a solicitor can recover costs for conducting a suit if he has not given his client the benefit of his personal judgment and superintendence⁶. A solicitor and confidential agent, who neglected to keep regular and proper accounts, was refused his costs and charges on this ground⁷.

A shipmaster who was guilty of habitual drunkenness or other wilful misconduct during his employment, was held not entitled to his wages⁸.

1. *Toppin v. Healey*, (1863), 11 W. R. 466.
2. *Campanari v. Woodburn* (1854), 24 L. J. C. P. 13.
3. *Solomons v. Pender*, 3 H. & C. 639.
4. *Andruse v. Ramsay*, (1908) 2 K. B. 635; *Price v. Metropolitan House Investments etc.*, 23 T. L. R. 639 C. A.; *Sirdhar Vasant Rao v. Gopal Rao*, A. I. R. 1940 Mad. 299=188 L. C. 626.
5. *Whitehead v. Lord*, 21 L. J. Ex. 289; *Nicholls v. Wilson*, 11 M. & W. 106; *Van Sandau v. Browne*, (1892), 9 Bing. 402; *Underwood v. Lewis*, (1894), 2 Q. B. 306.
6. *Hopkinson v. Smith*, 1 Bing. 18.
7. *White v. Lincoln*, 8 Ves. 363; *Ol. Re Les Exp. Neville*, L. R. 4. Ch. 48.
8. *The Malcol* (1880), 5 P. D. 254; *The Dunmore* (1875), 82 L. T. 840; *The Roebuck* (1874), 31 L. T. 274; *The Atlantic* (1868), 7 L. T. 647.

But where an act of the agent is not fraudulent but is done under an honest belief that he is entitled to do it, the mere fact that it contravenes the law or is in breach of his duties towards the principal is not sufficient to deprive him of his commission. For instance, where an auctioneer is employed to sell property on the term that he should receive a commission and out of pocket expenses, and with the honest belief that he is entitled to do so, he receives discounts from printers and advertisers and charges the principal in full without deducting them, he does not lose thereby his right to commission although he must account for the discounts received by him.¹ So, where a commission agent fraudulently overcharged his principal in respect of some transactions, but acted honestly in other separate and distinct transactions, it was held that he was entitled to commission on the transactions in which he had acted honestly.²

An agent, employed to find a purchaser, procured an offer, which the vendor accepted, subject to contract. Subsequently, a higher offer was made by another party to the agent, which he failed to communicate to the vendor, and the vendor concluded a contract with the person whose offer had been accepted. The vendor recovered as damages from the agent the difference between the price fixed by the concluded contract and the higher offer. Held, that, in the circumstances, the agent was entitled to commission on the price so fixed and the damages.³

The estate department of a company acting for the vendor of a house introduced a purchaser, and, in ignorance of the agency, the building department of the company acted for the purchaser and made a report on the house which had the effect of reducing the price. Held, that the vendor having sold the house to the purchaser so introduced, was liable for the commission, notwithstanding the company's breach of duty in acting for the purchaser.⁴

In *Heath v. Parkinson*⁵, an agent was employed by a lessee to find a purchaser of leasehold premises which were subject to a covenant prohibiting the carrying on of any business other than that of a music-seller without the consent of the lessor. Several tailors made offers to the lessee to buy the premises for £ 2, 500, but the lessee believing that the lessor would not consent, did not approach him upon the matter. The agents, having an offer from a tailor of £ 2,250, and having obtained an assurance from the lessor that he would consent to a tailor's business being carried on upon the premises, concealed from the lessee the fact that the lessor had so assured his consent and the nature of the business of the person making the offer, and induced the lessee to accept £ 2, 250. Held, that the agent was not entitled to any commission.

If an agent perform his duties so negligently that no benefit results from his services, he is not entitled to any

1. *Hippisley v. Knes* (1905) 1 K. B. 1.

2. *Nitedale Tændstikfabrik v. Bruster*, (1906) 2 Ch. 671.

3. *Keppel v. Wheeler* (1927) 1 K. B. 577.

4. *Harrods Ltd., v. Lemon* (1931), 2 K. B. 157.

5. (1926), 136 L. T. 128.

remuneration whatever¹. A broker is employed to negotiate a contract for the hire of a vessel. The contract goes off in consequence of his negligence or default. He is not entitled to recover any remuneration, or even the expenses incurred by him².

If an auctioneer, who is employed to sell property by auction, sells it by private contract, he is not entitled to commission³.

An auctioneer, who was employed to sell an estate, negligently committed to insert in the conditions of sale a proviso usually inserted therein, and in consequence of the commission the sale was rendered nugatory. Held, that he was not entitled to any compensation or remuneration for his services although the particulars of the sale had been submitted to the principal, and were not objected to by him⁴.

Section 220 of the Indian Contract Act reads as follows:—

"An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of that business which he has misconducted."

The following *illustrations* are added:—

- (a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to A.
- (b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

It has been held that an agent appointed under an irrevocable contract of agency may be removed if he is guilty of misconduct in the performance of his duties⁵.

Generally where an agent undertakes to render services for a fixed salary at a fixed rate it will be presumed in the absence of anything to show a contrary intention, that the amount so fixed is to cover his compensation for all services connected with that undertaking. If, therefore, the principal enlarges his powers or imposes additional duties upon him, but without stipulation for an increased compensation, the rate fixed will be deemed to be full compensation for all the services rendered and no extra commission can be recovered for the performance of the added duties.⁶

When agent
can recover
for extra
services.

It has been held that to warrant such a recovery there must be an express or implied promise to pay for the extra

1. *Hamond v. Holiday* (1824), 1 C. & P. 384; *Hill v. Featherstonhaugh* (1881), 7 Bing. 569.
2. *Dalton v. Irwin* (1890), 4 C. & P. 289.
3. *Marsh v. Jeff* (1862), 3 F. & F. 284.
4. *Deneve v. Daverell*, (1818), 3 Camp. 451.
5. *Kunchum v. Subramanian*, 33 Mad. 162.
6. See *Katar*, pp. 458, 459.

work or a legal custom to that effect.¹ If the employment is not limited by time or work or there is no agreement for extra compensation the mere fact the amount of compensation was originally fixed in contemplation of the expectation that the services, which the agent is to perform, will usually be about a certain amount of work, or will consume about a certain time, does not entitle the agent to any extra charges for the work done or time occupied beyond such expectation.² The fact that a statute fixes the number of hours which shall constitute a day's work, but does not require overtime to be paid for, does not change the rule.³ Where the agent, has, from time to time, entered into apparent settlements in full, without making any claim for extra compensation, he will ordinarily be estopped from setting up such a claim at a later time.⁴ Where, however, the service, for which extra compensation is claimed, is of a nature so unusual or so disconnected with those contemplated by the contract of employment, that the presumption, that it is covered by the compensation agreed cannot arise, the agent is, of course, entitled to be remunerated for it.⁵

Quantum meruit.

Where one has expressly or impliedly requested another to render him a service without specifying any remuneration, but the circumstances of the request imply that the service is to be paid for, the law will imply a promise to pay *quantum meruit*, i.e., so much as the party doing the service has deserved, or as it is normally said, a reasonable sum.⁶ The claim for *quantum meruit*, can only arise upon a promise to be implied from a request by the defendant to the plaintiff to perform services for him or from the acceptance of such services as the plaintiff rendered so as to imply a promise to pay for the same.⁷

But, as already noted, a liability by implication is excluded by the contract being express, and in answer to the contention that there was an implied contract to pay the agent a *quantum meruit* for his services, it has been observed that there could be no implied contract where there was an express contract.⁸ Where, therefore, the parties have entered into an express agreement under which the plaintiff is to get his brokerage if he brought about a transaction on certain terms, there is no scope for the operation of the principle of *quantum meruit*. The plaintiff can only be entitled to his remuneration in case of success, no matter what amount of labour and trouble he might be put to. Thus, if a sailor hired for a certain sum provided he

1. *Marshall v. Parsons*, 9 C. & P. 666, See Katar, p. 459 and the authorities cited therein.

2. *Mechem*, § 1522.

3. Katar p. 459, and the authorities cited therein.

4. *Lusk v. Hotchkiss*, 9 Am. Rep. 814; *McCarthy v. Mayor*, 48 Am. Rep. 601.

5. *Benjamin v. Public Service Pub. Co.*, 11 N. Y. Supp. 208.

6. *Mechem*, § 1522, *Standard Elevator Co. v. Brumley*, 149 Fed. W. 184.

7. *H. N. Ry. Co. v. Rattanji*, A. I. R. 1935 Cal. 347=62 Cal. 175=156 I. C. 648.

8. *Mason v. Hfon, Bart.* (1868) 3 F. & F. 899; *Howard Houlder etc. v. Maw Isles Steamship Co.* (1923) 1 K. B. 110; *Liladhar v. Mathuradas*, A. I. R. 1934 Bom. 158=58 Bom. 583=150 I. C. 871.

9. *Roopji & Sons v. Dyer Meakins*, A. I. R. 1930 AH. 545.

10. *Kishan Prasad v. Purnendu*, 16 C. W. N. 753, 761; *Roopji & Sons v. Dyer Meakins*, *supra*.

proceed, continue and do his duty on board for the voyage, and before the arrival of the ship he dies, no wages can be claimed either on the contract or on a *quantum meruit*¹. Similarly, where the contract provides for agent's commission on the payment for the goods by the purchasers, the agent is not entitled to remuneration on cancelled contracts, and the doctrine of *quantum meruit* cannot be involved².

69. Principal's duty to keep the agent employed according to the terms of the contract.

Principal's duty to keep the agent employed according to the terms of the contract arises from the terms of the contract³. Unless the contract of agency is entered into for a fixed term or from the circumstance under which the employment was made it can be reasonably inferred that it was meant to be for a particular period, the principal is not bound to continue the agent in his employment. All that is necessary for him, if he wants to dispense with his services, is to give him a reasonable notice so that he may have a reasonable time to secure another employment or otherwise to accommodate himself to the new situation thus created. If inspite of such reasonable notice he does not get another employment or is unable to make up the loss caused by his non-employment, he cannot hold the principal responsible for it. But where the contract of employment is for a fixed period it is the duty of the principal as a party to the contract to respect its terms and to keep the agent employed for that period. Even in such cases, however, the principal is justified in discharging the agent before the expiry of the fixed period if the agent is guilty of any misconduct in the due discharge of his duties. This subject and the liabilities which arise from the breach of the duty as well as the measure of compensation are dealt with in a subsequent chapter.⁴

70. Agent's rights of reimbursement and indemnity against the principal.

The principal has a duty to indemnify agent against any loss sustained or liability incurred or expenses made or personal injury suffered in the execution of his authority. This is based on the principle that the agent has a right to assume that the principal will not call upon him to perform any duty which would render him personally liable to a third person or would injure his person or property. Having no personal interest in the act other than the performance of his duty the agent should not be required to suffer loss from the doing of an act, apparently lawful in itself, and which he has undertaken to do by the direction, and for the benefit and advantage of his principal.

1. *Cutter v. Powell*, 2 Smith L. C. 1.

2. *Francis v. Sir Edward Sassoon*, 1927 Bom. 225. But see *Stokes v. Soender Nath* 22 Bom. 540, a case where a contract of sale of certain property fell through but plaintiff broker was held to be entitled to a percentage on the value of shares received by the defendant seller as security for the performance of the contract of sale.

3. See Bowstead, Art. 64, p. 142.

4. See under the Chapter "Termination of Agency."

pal.¹ For instance, if, in the distinct performance of such act, the agent invades the rights of third persons and incurs liability to them, the loss should fall rather upon him for whose benefit and by whose direction it was done than upon him whose only intention was to do his duty to his principal. Where, therefore, an agent is called upon by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law imposes a promise on the part of the principal to indemnify the agent for such losses as flow directly and immediately from the very execution of the agency.² The English law on the subject is thus stated by Bowstead³:

"Subject to the provisions of Articles 71 and 72, every agent has a right against his principal founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority; and where the agent is sued for money due to his principal, he has a right to set off the amount of any such losses, liabilities, or expenses, unless the money due to the principal is money which was deposited with the agent for a specific purpose which has failed, or is the balance of money, so deposited, which remains after such purpose has been fulfilled

An agent who makes advances to his principal has a right of action as well as a lien, for such advances; provided that a *del credere* agent cannot sue for advances which are covered by sums due to the principal the payment whereof he has guaranteed."

Articles 71 and 72 of the same read as follows —

"71. Where an agent authorised to deal at a particular place, or in a particular market, he is entitled to be indemnified by the principal against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority under the rules or regulations, or according to the customs or usages, of that place or market. Provided that no principal incurs any liability in consequence of any unreasonable rule, regulation, custom or usage, unless he had notice thereof at the time when he conferred the authority on the agent.

72. No agent is entitled to indemnity against any losses or liabilities, or reimbursement of any expenses incurred by him—

- (a) in respect of any act or transaction which is obviously or to his knowledge, unlawful, except where he is entitled to contribution towards damages for which he is liable in tort;
- (b) in respect of any gaming or wagering contract or agreement rendered null and void by the Gaming Act, 1845;

1. Mechem, §. 1608

2 See Katral, p. 460, and the American authorities cited therein. See also *Dugdale v. Lovering*, L. R. 10 C P 196

3. Art. 70, p. 162

...of any unauthorized act or transaction not attributable to the principal.

...of his own negligence, default, misfeasance, or breach of duty.

The act for which indemnity is claimed must have been done by the agent while acting, within the apparent scope of his authority. The rule includes only such losses as are the direct consequences of the execution of agency¹ and are not attributable to any negligence or default of the agent². In order to entitle the agent to recover from his principal, he must show first, that the loss arose from the fact of his agency; secondly, that he was acting within the scope of his authority, and thirdly, that the loss was not attributable to any default or laches on his part. Right to indemnity for tort-obligations or obligations incurred by breach of contract is limited to the loss actually caused to him and does not extend to the liabilities he might still be under to third persons until such liabilities are enforced by such third persons or are discharged by the agent.⁴ The rule is, however, different in the case of contractual obligations for which indemnity can be claimed even though the agent has not as yet discharged the obligations⁵.

In India, section 222 of the Indian Contract Act, 1872, provides as follows:—

The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Law in India.—Agent to be indemnified against consequences of lawful acts.

ILLUSTRATIONS

- (a) B, at Singapore, under instructions, from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incur expenses. A is liable to B for such damages, costs and expenses.
- (b) A, a broker at Calcutta, by the orders of A, a merchant there, contracts with O for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and O sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incur expenses. A is liable to B for such damages, costs and expenses.

This section is founded upon the well-recognised principle of English law referred to above, namely, that every agent has right against his principal founded upon an implied contract to be indemnified against all losses and liabilities and to reimburse all expenses incurred by him in the exercise of his authority. The principal's duty to indemnity is no part of the contract but is obligation attached by law to the relation of principal and agent constituted by act of the parties.⁷ An agent

1. *Fry v. Tyler*, 10 Moo. P. C. C. 175; *J. L. Case Thresh Machine Co. v. Gardner*, 24 Ky. law Rep. 82.
2. *Barth v. International Horse Agency*, (1906) 1 K. B. 270.
3. *Barth v. Holding & Tarrant*, 50; *Duncan v. Hill*, L. R. 5 Ex. 242; *Lacey v. Hill*, L. R. 48 Ex. 182.
4. *Bank v. Mechanics Bank*, 49 N. Y. App. Div. 178; *Oliver v. Bank*, 27 Ill. App. 285; *Spalding v. Green*, 96 Wis. 612.
5. *Spalding v. Green*, 96 Wis. 612; *Lacey v. Hill*, *Green v. Bank*, L. R. 48 Ex. 182.
6. *Spalding v. Green*, 96 Wis. 612—147 N. C. 224.
7. *Spalding v. Green*, 1910 N. W. 210.

on general grounds is entitled to reimbursement and indemnity by his principal, but only on the condition that he has acted within the scope of his directions¹.

"If an agent has, *without his own default*, incurred losses or damages in the course of transacting the business of his agency or in following the instructions of his principal, he will be entitled to full compensation therefor. . . . But it is not every loss or damage for which the agent will be entitled to reimbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency"²

"The case of *Duncan v. Hill*³ is a direct authority that there is no implied promise by a buying principal to his broker that he will indemnify him from the consequences of his own wrong,⁴ such as insolvency⁵ or negligence⁶ or having sold at a loss in breach of his agreement with the principal."

As already observed, the right of indemnity extends to losses or liabilities incurred in the exercise of the authority according to the rules and customs of the particular trade or market in which the agent is authorised to deal, provided the rule or custom in question is a reasonable one, or the principal had notice of it at the time when he conferred the authority;⁷ but if the rule or custom is unlawful or unreasonable, and was unknown to the principal, he is under no liability to indemnify the agent against the consequences of acting on it.⁸

C. i f. contract with commission agent.

Though, under an ordinary c. i. f. contract between sellers and buyers, the tender of a bill of lading after the contract of affreightment has been dissolved by the out-break of war is not such a tender as the buyers are bound to accept, such a tender is a good tender when goods are ordered through a commission agent "on account and at the risk of" the principal, and the principal is bound to accept the tender and pay for the goods. "To throw these goods on the agent's hands and leave them to bear the loss which has arisen by reason of the outbreak of war while the goods were in transit appears to be entirely opposed to, and inconsistent with, the general principles of the law of agency."¹⁰

1. *Firm Shamas Din v. Aga Mahammad*, 59 I. C. 971.

2. Story on Agency, §. 389, cited *arguendo* in *Duncan v. Hill* L. R. 8 Ex. 242, at p. 244.

3. (1873) L. R. 8 Ex. 242.

4. *Ellis v. Pond* (1898) 1 Q. B. 426, 441. As to death or insolvency of the principal justifying an immediate sale by a broker who has bought on the principal's account with his own money; See *Lacey v. Hill* (1878) L. R. 8 Ch. 921; as to the broker taking over shares that are practically unmarketable, see *Finlay* (1918) 1 Ch. 565, C. A.

5. (1873) L. R. 8 Ex. 242.

6. *Lewis v. Samuel* (1846) 8 Q. B. 685.

7. *Ellis v. Pond*, *supra*.

8. See also *Seymour v. Bridge*, (1885) 14 Q. B. D. 460; *Kedusoe v. Sarajmal*, A. I. R. 1886 Nag. 37=161 I. C. 787.

9. *Percy* - - - (1885) 15 Q. B. D. 388 (custom to disregard the provisions of an Act of Parliament).

10. *Harry Meredith v. Abdulla Sahib* (1918) 41 Mad. 1060=49 I. C. 196.

It is to be observed that sections 223 to 225 of the Indian Contract Act must be taken as supplementing, not restricting, the rights of an agent under the general law regulating contracts of indemnity, for instance, sections 124 and 125 of the Act.¹

The following are some of the illustrations of the general principle involved:

1. A employs B to find a purchaser for certain bark. C. agrees with B to purchase the bark, subject to its being equal to sample. B, being offered a *del credere* commission by A, accepts A's draft for the price of the bark, and in due course pays the amount of the draft. C, then refuses the bark as not being equal to sample. B is entitled to recover from A the amount of the draft paid by him.² But where a factor sold goods and took a bill of exchange payable to himself from the buyer, sending his own promissory note for the net proceeds to his principal, without disclosing the buyer's name, it was held that, upon the buyer's insolvency, the factor could not recover from the principal the amount of the promissory note which the factor had paid to a holder who had taken the note from the principal.³

2. A instructs B, a stockbroker, to buy and sell various shares and stock, intending to receive or pay the differences. B is entitled to recover the amount of any losses paid by him at A's request in respect of such shares or stock, although he did not make separate contract on behalf of A, but appropriated to him portions of larger amount of shares and stock, which he bought as principal with a view of dividing it amongst various clients for whom he was acting.⁴

3. An auctioneer is instructed to sell certain property, and after he has contracted liabilities in reference to his employment, his authority is revoked by the principal. The principal must indemnify him against the liabilities.⁵

4. An agent incurs damages and expenses in defending an action on behalf of his principal. He is entitled to reimbursement of such damages and expenses if he was acting within the scope of his authority in defending the action, and the loss was not caused by his own default.⁶ Where an agent, exercising his best judgment, compromised an action brought against him in respect of a contract made on behalf of the principal, who had notice of the action, and had not given any instructions as to the course to be pursued, it was held that the agent was entitled to indemnity, although the plaintiff could not, in the circumstances, have succeeded in the action.⁷

1. See Pollock & Mulla, P. 598.

2. *Hooper v. Treffery* (1847), 1 Ex. 17, 16 L. J. Ex. 233.

3. *Simpson v. Swan* (1812), 3 Camp. 291.

4. *Ex p. Rogers; re Rogers* (1880), 15 Ch. D. 207, C. A.

5. *Warlow v. Harrison*, (1859), 1 El. & el. 295, 809, Ex. Ch. 3 *Brittain v. Lloyd*, (1845), 16 L. J. Ex. 48.

6. *Frixione v. Tagliferro*, (1855), 10 Moo. P. C. 175, P. C.; *C. E. Wells* (1895), 72 L. T. 859. See also *Ex Farnatia Development Corpn.*, (1914) 2 Ch. 271.

7. *Dutton v. Keeble* (1850), 19 L. J. C. P. 325.

5. An accommodation bill is drawn and accepted for the purpose of raising money for the benefit of the drawer and acceptor. The drawer instructs a bill broker to get the bill discounted. It is the common practice of bill brokers to give a general guarantee to the bankers who discount their bills, and not to indorse each bill discounted on behalf of their customers. The bill is discounted, and the broker becomes liable to the bankers upon such a guarantee. The broker is entitled to recover from the acceptor the amount that he is compelled to pay in pursuance of such guarantee with interest, it being a liability incurred in the execution of his authority in the ordinary course of his business as a bill broker.¹

6. A broker, in accordance with a reasonable custom of the particular market in which he was employed, rendered himself personally responsible for the price of goods brought on behalf of his principal, and subsequently duly paid for the goods. Held, that he was entitled to set off the amount so paid, in an action by the principal's trustee in bankruptcy for money due to the principal.²

7. An agent, who had general authority to receive and sell goods on behalf of the principal, in good faith brought an action against a third person who wrongfully withheld possession of the goods. In an action by the principal for the proceeds of the goods it was held that the agent was entitled to set off the amount of the costs incurred by him in the proceedings to recover the goods.³

8. If the particular purpose for which money is deposited with an agent fail, or if a balance remain after such purpose is fulfilled, the agent must return the money or balance to his principal and is not entitled to set off a debt due to him from the principal.⁴

No indemnity in respect of any act or transaction which is unlawful obviously or to the knowledge of agent.

As no agency is permitted by law for the doing of an unlawful act and no question of indemnity or contribution can legally arise among tort-feasors, an agent is not entitled to claim indemnity against any losses or liabilities in respect of any losses or liabilities in respect of any act or transaction which is obviously or to his knowledge unlawful. In such a case, not only does the law not imply a promise to indemnify, but it will not enforce even an express promise to that effect, and an express bond or other formal written agreement to indemnify the agent against consequences of a proposed act known or which he must be presumed to have known to be unlawful, is void as being against the policy of the law.⁵ Thus where an agent expends money on behalf of his principal in purchasing shares in a company which effects to act as a body corporate without authority by charter or statute, and which is, therefore, an illegal company, the agent is not entitled to recover from the principal the amount so expended.

1. *Ex. p. Bishop, re Fox* (1880), 15 Ch. D. 408.

2. *Cropper v. Galt* (1874), L. R. 9 Q. B. 124.

3. *Curtis v. Barding* (1894), 5 B. & C. 141.

4. *Stanger v. Duffield*, (1823) 1 Q. B. 214; 20 M. & W. 214; 12 East 181; 10 B. & C. 141.

5. See *Matheson*, § 1611.

insurance is obviously unlawful. So a broker who enters into a contract and spends money on it is not entitled to recover it from the principal. Nor is a broker or other agent under the English law, entitled to reimbursement or indemnity in respect of any contract of marine insurance which is not contained in a duly stamped policy. Similarly, an election agent who makes payments which are illegal under the Corrupt Practices Acts, cannot recover such payments from the candidate employing him. When an agent is employed to purchase shaggy goods and he purchases and pays for them, he cannot recover the amount so paid for his principal even though the latter has obtained possession of the goods.

The rule that a tort-feasor cannot recover upon either an express or implied promise of indemnity by the person at whose request or on whose behalf the tort is committed is confined to cases where the tortious act is obviously unlawful and does not apply when there is a bona fide doubt about the matter. Thus, where A instructs B an auctioneer, to sell certain goods of which A has no right to dispose and B having no knowledge of any defect in A's title sells the goods and duly pays the proceeds to A; but subsequently he is compelled to pay to the true owner the value of the goods, B is entitled to be indemnified by A for such payment in as much as the transaction was not obviously or to the knowledge of B unlawful.

Although by reason of section 80 of the Indian Contract Act, a wagering contract is void, a contract collateral to such a contract is not necessarily unenforceable and the fact that a person has constituted another person his agent to enter into and contract wagering transactions in the name of the latter, but on behalf of the former, the principal, amounts to a request by the principal to the agent to pay the amount of the losses, if any, on these wagering transactions, and a Hundi executed by the principal in favour of his agent for such payment has been held to be for good consideration. A broker or an agent may successfully maintain a suit against his principal to recover his brokerage, commission, or the losses sustained by him, even though contracts in respect of which claim is made are contracts by way of wager. It does not follow because a wagering con-

1. *Jespke v. Febrer* (1825), 8 B. & C. 699.
2. *Atkins v. Jupp* (1877), 2 Q. B. D. 875.
3. Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 97.
4. *Re Parker* (1882), 21 Ch. D. 408.
5. *See v. Mather* (1897), 3 Ves. 378.
6. *Dunn v. Giffins* (1884), 4 L. J. K. B. L; *Cory v. Lambton* (1917), 86 L. J. K. B. 401, C. A.
7. *Adams v. Jarvis* (1887), 4 Bing. 68.
8. *Shukla Lal v. Lachman*, 23 All. 165; *Chakka v. Gaffda*, 14 Mad. L. J. 226; *Shyamshankar v. Manraj*, 1895 P. B. 80; *Jeta Mal v. Subba Singh*, 1890 P. B. 90; *Behari Lal v. Parbhu Lal*, 1908 P. B. 79 (W. B.); *D. Norman v. P. P. Hingia*, 51 L. C. 590 (Bur.); *Rishi Chand v. Kankhu Mal*, 45 All. 504; As to the position of a public Auctioneer, see *Shyamsunder Furumram v. Burford Bhatnagar Bhatnagar*, L. R. 45 Ind. App. 22; *Maitland v. Kishan*, 22 Bom. L. R. 408; *Mansel v. Radhakrishnan*, 22 Bom. L. R. 1018.
9. *Jay Narain v. Sri Kishan Das*, 58 All. 218.
10. See also *Durga Prasad v. Narayana* (1927) 49 All. 229=102 L. C. 605; *Samby Lal v. Bhagwan Das*, L. R. 1940 All. 85=188 L. C. 511. Much more can be said on this subject. See also *the agent money deposited with him as security*, *Harden v. Bannister*, L. R. 1827. All. 229=100 L. C. 774.

agent is void that contracts collateral to it cannot be enforced. The fact that a person has constituted another person his agent to enter into and conduct wagering transactions in the name of the latter but on behalf of the former (the principal) amounts to a request by the principal to the agent to pay the amount of the losses, if any, on those wagering transactions¹⁵, and if such payment is made, the agent is entitled to recover the amount from him. Conversely an agent who has received money on account of a wagering contract is bound to restore the same to his principal.³ In the Bombay Presidency, however, contracts collateral to or in respect of wagering transactions are prevented from supporting a suit by the special provisions of the Act for Avoiding Wagers (Amendment) Act, 1865. In England also, the Gaming Act, 1892 (55 Vict. C. 9) provides that any contract, express or implied, to pay any person any sum paid by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 (8 & 9 v. c. 109) shall be null and void and no action shall be brought or maintained to recover any such sum. This Act declares that all the gaming or wagering contracts or agreements are void as being against public policy. So although the English cases before the passing of the Act of 1892 are still good authority in India, those after it are not to be followed here. Before the passing of the Gaming Act, 1892, it was held in England that gaming and wagering contracts are not unlawful, but merely void and money paid by the agent in pursuance thereof was recoverable from the principal even though he had repudiated the transaction before such money was actually paid, the agent being entitled to be indemnified against the moral liability, incurred by him in the executing of his authority¹. A plea of "gaming and wagering" was, therefore, no answer, then, to an action by a stockbroker for differences paid on his client's behalf². This rule, however, does not extend to payments made by the agent in pursuance of gaming and wagering contracts made by himself on his principal's behalf in as much as the object of the agency to enter into such contracts being itself unlawful as opposed to public policy the agent ceases to have authority to make such payments³. Where a broker is employed to speculate in the purchase and sale of stock and transaction is entered into by him in which both parties to the contract intend that no stock shall be delivered but only differences paid or received, the transaction being a wagering transaction any payment made by the broker on behalf of the principal in respect thereof

1. *Parkash Govardhanbhai Haribhai v. Ransordas Dubabhdas* (1875) 12 B. H. C. 51, 57. The agent's right to recover is, of course, limited to payments actually made and enforceable liabilities incurred, see *Mutsaddi Lal Sona Ram v. Bhagirath* A. I. R. 1929 Lah. 875=115 I. C. 424.

2. *Bhole Nath v. Mul Chand* (1908) 25 A.H. 639; *Debi Sahai v. Ganesh Lal* 46 P. B. 1901; *Maung Po Hsath v. Brumadin*, A. I. R. 1929 Rang. 244=119 I. C. 740;

3. *Muthuswami v. Veeraswami*, A. I. R. 1936 Mad. 486, *Khetia v. Nath* v. *Madan-swar*, A. I. R. 1937 Cal. 297=169 I. C. 177.

4. Rowland, Art. 72. Illustrations 6 and 7.

5. *Booswami v. Bittling*, 55 L. J. Q. P. 55; *Hannan v. Denton*, 5 T. L. R. 708.

6. *Thacker v. Hardy*, 4 Q. B. D. 685; *Shibai Ramai (Bank of) v. Firm of Hriram Chhadanlal*, 1922 Lah. 408.

cannot be recovered by him'. A provision in such contract that either party may in his option require completion of the contract itself instead of payment or receipt of differences does not take away the contract from the category of a wagering contract¹. On the other hand, if either party intend that stock or shares shall be delivered and paid for, the contract is not a wagering contract, even if it provide for the payment of an enhanced price in the event of the stock or shares being taken up². Where a principal, intending to speculate employs a broker to buy and sell stock on the stock Exchange, and the broker, being aware that the principal does not intend to give or take delivery of the stock but only to settle differences, makes the contracts for the purchase or sale of stock on his principal's behalf and makes himself personally liable for them, he is entitled to indemnity because the transactions entered into by him are real contracts for the purchase and sale of stock and not gaming or wagering contracts³.

Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Agent to be indemnified against consequences of acts done in good faith

ILLUSTRATIONS

- (a) A, a decree-holder, and entitled to execution of B's goods, requires the officer of the court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C in consequence of obeying A's directions.
- (b) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B, and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay C, and for B's own expenses.

(S. 223, Indian Contract Act, 1872)

An agent is entitled to indemnify against the unlawful acts which are not criminal provided he has acted in good faith and without knowledge that such acts are unlawful⁴. But agents who engage in a fraudulent scheme to defraud their principal, forfeit their right to indemnity in respect of the fraudulent transactions⁵.

Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Non-liability of employer of agent to do a criminal act

1. *Grisswood v. Blane* (1851), 6 B. 526, 538; *Universal Stock Exchange v. Strachan* (1896) A. C. 166, *Re Glass*, (1899) 1 Q. B. 794; *Philip v. Bennett* (1901), 18 T. L. R. 129; *Wood v. Fenes* (1898), 14 T. L. R. 492.
2. *Universal Stock Exchange v. Strachan*, (1896) A. C. 166.
3. *Philip v. Bennett* (1901), 18 T. L. R. 129.
4. *Thacker v. Hardy* (1878), 4 Q. B. D. 685; *Forrest v. Ostigny* (1895) A. C. 316; *Lightbody v. Babulka*, 12 T. L. R. 102; *Franklin v. Dawson*, (1918) 29 T. L. R. 479; *Barnett v. Sankar* (1925), 41 T. L. R. 660; *Weddell v. Hackett* (1929) 1 K. R. 321; *Woodward v. Wolfe* (1936), 80 S. J. 976.
5. *Firm Mathaji v. Yar Hussain*, A. I. R. 1928 Sind 40=84 I. C. 960.
6. *Salloway v. McLoughlin*, 1938 F. C. 23.

ILLUSTRATIONS

- (a) A employs B to write a letter to C, who agrees to indemnify B against all damages which B may incur in consequence of the letter. B writes the letter, and C sues B for damages. A is not liable to indemnify B for those damages.
- (b) A the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

(S. 224, Indian Contract Act, 1872.)

Pollock and Mulla's comments on illustration (b) above are as follows:

"Illustration (b) seems to assume that every libel for which damages can be recovered is also a crime, or, in other words, that defamation as defined in the Indian Penal Code includes all the cases in which a civil action for injurious words is maintainable in British India. We are not aware of any authority for such an assumption. An indemnity against damages for libel is now a common clause in agreements with publishers in England, and we have not heard of any one suggesting that such a term is invalid as being against public policy. Probably the true construction of the section is that it only applies where the act is criminal on the part of the agent, which in most cases would amount to the same thing as saying that it must be criminal to his knowledge. The rule could hardly be held to apply to a crime committed by means of an innocent agent."

It has been held that if some of the partners, on behalf of the firm and with the express or implied consent or concurrence of the other partners spent certain sums on bribes credit should be given to the former for the amounts.

Where the fault is mutual the law will leave the loss as it finds it according to the maxim, "*in pari delicto potior est conditio defendentis*." The law in such cases refuses to interfere on either side upon the principal "*Ex turpi causa non oritur actio*".

To entitle the agent to indemnity it is necessary that the loss or injury must be a direct and natural consequence of the execution of the agency. The principal cannot be held responsible for an injury caused by the wrongful and negligent act of a third person, for which the execution of the agency gave, perhaps, an opportunity, but of which it was not the legal cause. Thus, unless the principal had reason to anticipate the danger he is not responsible to the broker who while going upon the principal's business is way-laid by a robber or to a travelling salesman going from town to town who is injured by the

1. Indian Contract Act, 7th Edn. s. 225.
2. *John Brown v. Harcourt*, A. L. J. 1888 All. 123; 197 L. Q. 824.
3. See *Wickham v. Wickham*.
4. *Hadkinson v. Hadkinson*, 1808, 1 E. R. 270. See also *Hadkinson v. Hadkinson*, 1808, 1 E. R. 270.

of a carrier.¹ In *Halbroon v. International Horse Agency*,² the defendants instructed the plaintiff, an auctioneer in Paris, to advertise for sale a mare, which they represented to him to be a thoroughbred, and registered in the English Stud Book under the name of Pentecost. The plaintiff complied. A Frenchman the owner of a thoroughbred mare also called Pentecost, sued the plaintiff in France alleging that he had suffered damage through the defendant's mare being advertised for sale under that name. It was held that A was not liable to indemnify the auctioneer against the loss, because, the description in the advertisement being a true description, the loss could not be said to have been incurred in consequence of any act of the auctioneer in pursuance of his employment, but in consequence of the erroneous decision of the French Court.

The loss or liability must be a direct consequence of the execution of the agency.

Where, however, an agent, by the direction of his principal takes possession of a personal property which is claimed adversely by another but which he has reasonable ground for believing to belong to his principal, he is entitled to be indemnified when he is compelled to pay damages for doing so.³ So also, an agent who, acting under the direction of his principal, cuts timber by mistake upon the land of another, which timber is received and used by the principal, is entitled to recover of his principal what he has been compelled to pay as damages for the trespass.⁴ Similarly, an agent who, having recovered upon a claim due to his principal and having paid the proceeds to him, is compelled, upon the reversal of the judgment in accordance with the terms of law and without any fault of his own, to refund the amount previously collected is entitled to be indemnified by the principal against the consequences of such reversal.⁵ So, where a person is employed in the usual course of his business as an auctioneer or warehouseman to sell or deliver goods by one who claims to have right to do so, the law will imply a promise from the latter to indemnify him if he is compelled to pay damages to another who establishes a superior right to the goods.⁶ So also, when a rail road contractor, who had acted under express instructions from the company, was charged in damages to one whom he had ejected from the train for not producing such a ticket as he had been directed, though unlawfully, to insist upon, it was held that he was entitled to be indemnified by the company.⁷ In *Clark v. Jones*,⁸ where an agent, who had purchased and shipped property for his principal which the principal failed to pay for, was sued and arrested for the price and was compelled to pay it, it was held that the principal was bound to reimburse him for the amount paid and for his costs and attorney's fees. It has been held that in

1. *Baxter v. Roberts*, 13 Am. Rep. 120

2. (1903) 1 K. B. 270

3. See *Katlar*, p. 468 citing *Moore v. Appleton*, 73 Am. Dec. 443.

4. *Drummond v. Humphreys*, 30 Me. 347.

5. *D'Arcy v. Lyle*, 5 Binney (Pa.) 441.

6. *Nelson v. Cook*, 17 Ill. 443; *Adamson v. Jarvis*, 4 Bing. 66; *Butts v. Gibbons*, 2 A. & E. 57.

7. *Hove v. Buffalo etc. R. R. Co.*, 37 N. Y. 297 cited by *Katlar*, p. 469

8. 34 Tenn. 251

these cases the agent need not wait to be sued by the third person for damages but may pay him at once and thereupon recover the amount paid from the principal¹. Where, however, he thus pays without the protection of a judgment which will bind the principal, he can recover from the principal only to the extent of the injury, actually sustained by the third person, though he may, in fact, have paid more. The right of indemnity exists in either case whether the agent is sued alone or jointly with the principal.²

Acts not authorised by the principal or not subsequently satisfied by him.

An agent is not entitled to indemnify for losses or liabilities in respect of any act or transaction not authorised by the principal or not subsequently ratified by him. As already observed, duty of the principal to indemnify the agent for a loss or liability extends to loss or liability which results from acts or transactions actually authorised by him or which are covered by his implied authority or which the agent believes in good faith to be falling within his authority.³ The right of the agent to such indemnity does not extend to unauthorised acts or transactions unless the principal chooses to satisfy them in such a way as to admit and undertake the liability upon himself.⁴ A authorised B a broker to effect a marine insurance policy. After the underwriters have signed the slip, but before a binding contract is made, A revokes B's authority. B, nevertheless, effects the policy, and pays the premiums. B cannot recover the premiums from A, having acted without authority.⁵

A authorises B and C to insure his life in their names. They insure on the names of B, C and D, and pay the premiums. They are not entitled to recover the amount of the premiums from A, not having strictly pursued their authority.⁶

A, a broker, contracted on behalf of B to sell certain shares to C. In consequence of the non-delivery of the shares, C brought against B, without having tendered a transfer to him and A paid C the difference, although B had given him express notice not to do so. Held, that C could not have recovered the difference until a transfer had been tendered by him, and that as A had paid the amount without B's authority, he was not entitled to indemnity from B. Otherwise, if the payment had been made in discharge of a liability incurred by A.⁷

Wherever payment is made against instructions or wrongfully it is not recoverable from the principal.

A, a stock-broker, by B's instructions, buys seventy shares for special settlement. Owing to difficulties in connection with

1. *Saviland v. Green*, 36 Wis. 612.

2. *Howe v. Buffalo etc. R. R. Co.* *supra*.

3. See S. 225, Indian Contract Act, 1872; *Mechem*, Sa. 1364 and 1609; *Howstead*, Art. 72, p. 170.

4. *Ibid*; see also *Frixione v. Tagliaferro*, 10 Moo. P. C. 175.

5. *Warwick v. Slade* (1811), 8 Camp 127; *Fisher v. Liverpool Ins. Co.* (1874), L. R. 9 Q. B. 418; *Home Marine Insurance Co. v. Smith*, (1998) 2 Q. B. 351.

6. *Barron v. Fitzgerald* (1840), 6 Bing. N. C. 201; *Service v. Bain* (1898), 9 T. L. B. 95, C. A.

7. *Bowley v. Bell* (1846), 16 L. J. C. P. 18; *Howard v. Tucker* (1831), 1 B. & Ad. 712.

the transfer, only twenty of the shares are delivered in time according to the rules of the Stock Exchange. The Committee resolve that A is to pay for the other fifty shares when delivered and A accordingly takes delivery and pays for them. B is not liable to indemnify A, the shares not having been delivered in accordance with the contract.¹ The Committee of the Stock Exchange have no power to alter a contract so as to bind non-members.²

A, an outside broker, being instructed by B to buy and sell various stocks, without B's consent appropriates to B's account certain stocks held by himself, and from time to time sells and repurchases other stocks bought by him on B's behalf. A is not entitled to recover from B any differences in respect of the stocks so appropriated or dealt with without his consent.³ So, where a broker, beside charging commission, added a small percentage to the contract prices, it was held that the principal was entitled to repudiate the transactions, and not merely to an allowance of the overcharges, because the broker had not in fact made the contracts in respect of which indemnity was claimed, but had made other contracts at different prices.

A draws a cheque on his banker. The amount of the cheque is altered without A's authority, and the banker, in good faith, pays the increased amount. The banker is only entitled to charge A with amount for which the cheque was originally drawn,⁴ unless A is estopped, by his negligence or otherwise, from denying the validity of the cheque as altered.⁵ Similarly, where a banker pays a cheque which has been altered as to the name of the payee, he cannot debit his customer with the amount of the cheque.⁶

In an action for money paid, laid out or expended it is always necessary that the plaintiff must prove some authority from the defendant to make such payment. So where a guard of a train used to pay the carriage on certain goods delivered to defendant it was held that he could not recover without proof of actual authority.⁷

The authority of an agent authorised to deliver up anything of which he had management ceases as soon as he has delivered it up and any payment or laying out of money on it after such delivery, even though for the benefit of the principal is only a voluntary payment and cannot be recovered.⁸

1 *Benjamin v. Barnett* (1903), 19 T. L. R. 564.

2 *Ibid*; *Union Corp'n v. Charrington*, (1902) 8 Com. Cas. 99.

3 *Stunge v. Lowitz* (1898), 14 T. L. R. 498, C. A.; *Johnson v. Kearley*, (1908) 2 K. B. 514; *Nicholson v. Mansfield* (1901), 17 T. L. R. 259; *Aston v. Kelsey*, (1918) 3 K. B. 814; *Blaker v. Hawes* (1918), 109 L. T. 320.

4 *Colonial Bank of Australasia v. Marshall* (1906) 75 L. J. P. O. 76 P. C. and other authorities cited at p. 174 f. n (i) of Bowstead's p. Law of Agency, 9th Edn., p. 174. As to countermanding payment of a cheque by telegram, see *Curtice v. London, etc. Bank* (1908) 1 K. B. 298.

5 *London Joint Stock Bank v. Macmillan*, (1918) A. C. 777, H. L.; *Young v. Grots* (1827), 5 L. J. (O. S.) C. P. 165.

6 *Slingsby v. District Bank*, (1932) 1 K. B. 544.

7 *Pappin v. Broster*, 1 C. & P. 112.

8 *Edmiston v. Wright*, 1 Camp. 88 N. P.

Where the agent made the contract not on the price he was instructed to make but on a different and higher price, it was held that the contract being without authority he was not entitled to claim indemnity.¹ As observed by Periam J: "If A becomes my bailiff of his own wrong without my appointment he is accountable to me, but I am not compellable to make him any allowance for his expenses about my business"²

Lack of authority due to principal's default.

An agent is entitled to indemnity if lack of authority is due to the principal's default.³ Every man who employs another to do acts which the employer appears to have a right to authorise him to do, undertakes to indemnify him for all such acts as would have been lawful if the employer had the authority he pretended he had.⁴ Where the principal undertakes to direct what he himself has no authority to perform, and the agent performs it in good faith and incurs expenses or liability the principal is estopped to deny that he had authority to so direct and must indemnify the agent for such expense or liability. So also, where the principal having conferred the authority revokes it without notice to the agent or it is terminated by an event within the special knowledge of the principal but not of the agent, the agent is entitled to claim indemnity for his acts and transactions effected in pursuance of such authority in spite of its such revocation or termination. Where, however, the authority was terminable without notice⁵ or where it was terminated by acts or events of which the agent was bound to take notice, the principal would not be bound to indemnify him for his acts or transactions done after the ceasing of the authority.

No indemnity in consequence of agent's own negligence, default, insolvency, or breach of duty.

The agent obviously can have no claim against his principal for indemnity as to losses caused by agent's own misconduct or default.⁶ Where the agent is subjected to loss not by reason of his having entered into contracts into which he was authorised to enter by his principal, but by reason of a default of his own, for instance, by his own insolvency, brought on by want of means to meet his other primary obligations it cannot be said that he has suffered loss by reason of his having entered into contracts on behalf of his principal, and consequently there is no promise which can be implied on the part of his principal to indemnify him.⁷ Where, however, the agent's failure is due to the principal's failure to meet his obligations the principal is bound to indemnify.⁸

A solicitor undertook a prosecution for perjury, and agreed that he would charge only out-of-pocket expenses. The prosecution failed in consequence of the negligent way in which the indictment was drawn. Held, that the solicitor was not entitled

1. Otherwise where the principal, though at first objecting, received the goods when they arrived and disposed of them. See *Cornwall v. Wilson*, 27 E. R. 1173. See also *Devaux v. Connolly*, 8 C. R. 640.
2. *Gawton v. Dacres* (Lord), 74 E. R. 201.
3. See *Meehem*, §. 1610.
4. See *Kotral*, p. 471 and the authorities cited therein.
5. *Meehem*, §. 1610.
6. *Hurst v. Holding*, 8 Taunt. 32; *White v. Chapman*, 1 Stark. 118; *Palmer v. Goodman*, 13 Ir. Ch. R. 171. Re, *Hereford Waggon Co.*, 2 Ch. D. 331.
7. *Duncan v. Gill*, L. R. 8 Ex. 242.
8. See *Katlar*, p. 473.

to recover the disbursements.¹ So, an agent is not entitled to be indemnified against a loss incurred by him in consequence of his own mistake on a point of law as to which he ought to have been competent.²

Where a stock broker who was instructed by his principal to carry over stock to the next settlement, became insolvent and was declared a defaulter before the next settling day in consequence of which the stock was sold at a loss, it was held that the loss being due to the agent's insolvency without any fault of the principal, the stock broker was not entitled to claim indemnity.³

A stock broker, having bought stock on the principal's behalf for the following settlement, wrongfully sold it before settling day without the principal's authority. The stock was at a higher price on settling day than when it was sold, but lower than the price at which it was bought. Held, that the broker was not entitled to indemnity, even subject to an allowance for damages for the breach of duty in selling without authority, the loss having been caused, not by any breach of contract on the part of the principal, but by the wrongful sale.⁴

Where, however, a broker instructed to buy shares, becoming a defaulter before the settling day, informs his principal to have the contract completed, the jobber being bound to complete it in such case if the principal wished it, or to consider it closed at the official price at the time of the broker's default, and the principal elects the latter course, he is bound to indemnify the broker against the loss, having ratified the closing of the transaction before the settling day,⁵ for the loss is then not occasioned by the bankruptcy, but is the result of the principal's own act.

To establish an obligation to indemnity, the agency must be the cause, and not merely the occasion, of the loss.⁶

The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Compensation to an agent for injury caused by principal's neglect

ILLUSTRATION.

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.

(S. 225, *Indian Contract Act, 1872*)

This, as a general rule, needs no proof or illustration. But the agent may be disentitled to relief if the injury was due to his own contributory negligence. Where the agent could by use of reasonable means avoid the consequence of the principal's negligence and is himself guilty of contributory negligence, he loses his right to indemnity.⁷ Again, where the risk is of such a nature as may be considered to be a material and necessary

1. *Levins v. Samuel* (1846), 8 Q. B. 685; *Thomas v. Atherton* (1878), 10 Ch. D. 185.
2. *Copp v. Topham*, (1805), 6 East. 392.
3. *Duncan v. Hill*, *Duncan v. Reeson*, (1873), L. R. 8 Ex. 242; *Allen v. Wainwright*, (1901) 17 T. L. R. 261, C. A.
4. *Ellis v. Pond*, (1998) 1 Q. B. 426.
5. *Hartas v. Ribbons*, 22 Q. B. D. 254 C. A.
6. *Story on Agency*, §. 341.
7. *Tuff v. Warman*, 27 L. J. C. P. 322.

consequence of his employment, no liability of the principal attaches to such risk, as in such case it may be said that the agent took upon himself the risk which he foresaw or ought to have foreseen.¹

Where injury is caused to the agent not by the neglect of the principal but of some other fellow agent working with him in the same business the principal is not liable unless he has been guilty of negligence in selecting or retaining such agent and the injury is due to his incompetency.² Similarly, it has been held that the principal is liable to the agent for injury caused by negligence of his General Superintendent or other representative or even of an independent contractor performing the principal's duties.³ Where, however, the person injured is a superior agent and the injury is caused by the negligence of an inferior agent the rule of a fellow agent stated above will not apply and the principal will be liable only when he is guilty of negligence in selecting or retaining such agent.⁴ The negligence or default of the principal herein referred to may consist of any of the following:—

- (1) keeping dangerous premises;⁵
- (2) Keeping dangerous appliances, tools, and machinery;⁶
- (3) Failure to effect repairs as agreed;⁷

1 See Katjar, p. 474 and the authorities cited therein.

2 See Katjar, pp; 475, 476 and 477, and the authorities cited therein

3 Ibid, p. 477

4 Ibid p 478 He is regarded as a fellow servant of the inferior servant causing injury although in the reverse position, i e where the person injured is the inferior servant and the person causing is his superior exercising his control over him, the rule of fellow servant does not apply See Mechem 8s 1648-1656

5. Where the service is to be performed upon the principal's premises, it is the duty of the principal to exercise reasonable care to provide a reasonably suitable place in which the agent exercising due care can perform his duty without exposure to dangers that do not ordinarily come within the scope of such employments as usually carried on, and having provided it to keep the same in a reasonable state of repair See Katjar p 478

6 See Katjar p 479 and the authorities cited therein. The principal owes a duty to exercise ordinary and reasonable care in view of the nature of the employment to provide and maintain safe appliances, tools and machinery. In all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. The principal is, however, under no obligation to provide the newest, latest and best machinery tools and appliances or to adopt every new improvement, but may conduct his business with such of them as he deems best adapted to his purposes and means provided he uses reasonable prudence and care in the election of such of them as are reasonably safe and proper for use and keeps them in a reasonable state of repair. In some cases it has been held that the principal is required to keep reasonably abreast with improved methods.

7. The agent is free to leave the service of the principal if from a change in the circumstances or the use of deteriorated machinery tools or appliances or material he is to undertake a substantially greater risk than that with which he had entered into the service, if he informs the principal of such increase of risk and the latter refuses to repair. If the principal undertakes to repair and the agent on his such undertaking continues in the service and sustains injury on account of the principal's failure to repair as agreed he is entitled to claim compensation for it from the principal—see Katjar p 479.

- (4) Employment of incompetent servants;¹
- (5) Not making and enforcing proper rules;²
- (6) Not furnishing necessary superintendence.³

It has been held that in all these cases reasonable care and prudence is the measure of the principal's duty. If he has exercised such care and prudence he is exonerated of the liability for the injury to the agent which may result to him in spite of it. The liability of the principal for injury is not confined to the business in which the agent is ordinarily employed but extends also to the business which may be entrusted to him from time to time by the principal or his authorised representative.⁴

71. Agent's lien on principal's property.

In the absence of any contract to contrary, an agent is entitled to retain goods, papers and other property, whether moveable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

(S. 22J, Indian Contract Act, 1872.)

A lien at common law is the right in one man to retain that which is in his possession belonging to another till certain demands are satisfied⁵. It is an obligation which by implication of law and not by express contract, binds real or personal estate for the discharge of a debt or engagement, but does not pass the property in the subject of the lien.⁶ The main distinction between the common law liens and other liens is that possession is essential to the former class and not always to the latter.⁷

Lien defined

There are two kinds of liens: a general lien and a particular lien. A particular lien is a right to retain of a thing for some charge or claim growing out of, or connected with, that identical thing. The claim may arise for labour expended, or by express contract, on an advance on a particular account. A general lien gives a right to retain a thing, not only for such charges and claims, but also for a general balance of accounts between the parties in respect to other dealings of a like nature. A general lien arises either by an express or implied agreement to that

1. It is the duty of the principal to use reasonable care and prudence in the selection and employment of his agents and servants, and for want of such care and prudence he is liable to all his other agents and servants who directly and proximately suffer injury therefrom.
2. Where the business to be carried on is complex and dangerous as usually in the case of railroad mines and the like, it is the duty of the principal to exercise reasonable care and prudence in making and promulgating such necessary and proper rules and regulations as may be required to enable the business to be carried on with reasonable safety. Katjar, p. 481 and the authorities cited therein.
3. Where the work which the agent is called upon to perform is complicated or difficult requiring the co-operation of other agents or servants under circumstances in which they cannot properly control themselves without signals and warnings and expert advice or instructions for its proper performance, it is the duty of the principal to exercise reasonable care to see that suitable superintendence and directions are supplied and for a breach of this duty he will be liable if injury results.—See Katjar, p. 481 and the authorities cited therein.
4. See Katjar, p. 481.
5. *Hammond v. Barclay* (1802), 2 East, 226.
6. *Fisher on Mortgages*, §. 149; *Evans on Agency*, § 362.
7. *See* *Hammond v. Barclay* (1802), 2 East, 226.

effect. Such an agreement may be implied from a course of dealing between the parties or from an established custom or usage.¹ Bowstead thus defines general and particular liens².

"A possessory lien is the right of a person who has possession of goods or chattels belonging to another, to retain possession thereof until the satisfaction of some debt or obligation by the owner of the goods or chattels.

Where the right is to retain possession in respect of a general balance of account, or until the satisfaction of debts or obligations incurred independently of the goods or chattels subject to the right, it is called a general lien.

Where the right is confined to debts and obligations incurred in respect of the goods or chattels subject to the right, it is called a particular lien."

The law of England does not favour general liens, and is regarded as an encroachment on the common law. A general lien can only be claimed as arising from dealings in a particular trade or line of business, such as wharfingers, factors, and bankers, in which the existence of a general lien has been proved and acknowledged, or upon express evidence being given that, according to the established custom in the particular trade, a general lien is claimed and allowed³.

Possessory
lien of
agents

Under the English law,⁴ every agent has a general or particular possessory lien on the goods and chattels of his principal in respect of all lawful claims he may have as such agent against the principal, either for remuneration earned, or advances made, or losses or liabilities incurred, in the course of the agency, provided—

(1) that the possession of the goods or chattels was lawfully obtained by him in the course of the agency, and in the same capacity in which he claims the lien;

(2) that there is no agreement inconsistent with the right of lien; and

(3) that the goods or chattels were not delivered to him with express directions, or for a special purpose, inconsistent with the right of lien.

The Possessory lien of every agent is a particular lien only, except where he has a general lien by agreement, express or implied with his principal. Such an agreement may be implied from a course of dealing between the principal and agent, or from an established custom or usage. Factors, insurance brokers, stockbrokers, solicitors, bankers, wharfingers, and packers, have a general lien by implication from custom.

In India also although section 221 of the Indian Contract Act, 1872, recognises only a particular lien, a general lien may

1. *Rushforth v. Hadfield*, 7 East 229; *Bevan v. Waters*, 3 C. & P. 520; *Searfe v. Morgan*, 4 M. & W. 283; *Houghton v. Matthews*, 5 B. & P. 494; *Bladen v. Hancock*, 4 C. & P. 156. See also Halsbury, 2nd Edn, Vol. I. Art. 439, p. 265.

2. Art. 78, p. 176.

3. See Lord Campbell's judgment in *Bock v. Gorrisson* (1860), 3 L. T. 424.

4. See Bowstead, Art. 74, p. 176, and the authorities cited therein.

be possessed by bankers, factors, wharfingers, attorneys of a High Court and policybrokers under section 171 of the Indian Contract Act, 1872, and by other agents under similar circumstances and on the same conditions as the two sections are not exhaustive and do not exclude possibility of the existence of a general lien in the case of other agents where there is an agreement interparties or a custom or usage warranting the existence thereof. Section 171 of the Indian Contract Act, 1872, reads as follows :

"Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain as a security for such balance, goods bailed to them, unless there is an express contract to that effect."

Under that section it has been held that a banker has a general lien on goods pledged for the purpose of securing payment of other debt of the pledgor though the debt for which the goods were pledged had been discharged¹. But where an amount is due under fixed deposit and payable to either of the depositors or survivor the bank cannot appropriate the money towards debt due by one of them alone². So money in a trustee account at a bank cannot be used to set off debts on a private account in the trustee's name³. Where a person hands over certain money to a bank to be transmitted to another place and to be paid to the payee there and the bank issues a bill of exchange or a demand draft, the money is held by the bank under a special contract which excludes the general lien of the bankers on the goods bailed⁴. The right does not extend to securities or other valuable property deposited with a banker merely for safe custody or for a special purpose,⁵ and this on the ground that the limited and special purpose must be deemed to imply a contract to the contrary, which seems to account for the absence from the text of any words expressly making an exception in such cases.⁶ Where a member of a firm deposited a lease to secure a particular advance to the firm, it was held that the banker had no lien for the general balance due from the firm⁷. Nor does the lien of a banker extend to title deeds casually left at the bank after a refusal by him to advance money on them;⁸ and where a deed, dealing with two distinct properties, was deposited with a memorandum charging only one of the properties with a specified sum and also the general balance due to the banker, it was held that he had no lien on the other property comprised in the deed.⁹

Banker's lien.

But, in order that the general lien may be excluded by a special agreement, whether express or implied from the circum-

1. *Kunhan v. The Bank of Madras*, 19 Mad. 234.

2. *Simla Banking & Industrial Co v. Mel. Bhagwan*, A. I. R. 1928 Lah 316=111 I. C. 554.

3. *Liyoda Bank v. Ad. Gen. of Burma*, A. I. R. 1934 Rang 66=151 I. C. 1018.

4. *Mercantile Bank v. Rachaldas*, A. I. R. 1926 Sind 225=95 I. C. 358.

5. See *Cuthbert v. Roberts, Lubbock & Co.*, (1909) 2 Ch. 226, C. A.

6. See *Pollock & Mulla* p. 511.

7. *Wolstenholm v. Sheffield Bank* (1886) 54 L. T. 746.

8. *Lucas v. Dorreйн* (1817) 7 Taunt. 278.

9. *Wyde v. Radford* (1864) 38 L. J. Ch. 51.

stances, the agreement must be clearly inconsistent with the existence of such a lien¹. Accordingly, a deposit of valuables with a banker to secure debts of a customer due to him as banker is subject to the banker's lien for the customer's general debts to him unless the customer can prove an agreement to give up his general lien.² Such an agreement may be evidenced, for example, by a memorandum of charge declaring that the deposit is to secure overdrafts not exceeding a named amount.³ This includes the banker's lien for any greater amount.⁴ As to boxes or sealed parcels deposited with a banker for custody without informing him of their contents or making them accessible to him, he has no lien on them even if the customer is in habit of leaving other securities with the banker against advances.⁵

It is to be observed that a banker's lien, when it is not excluded by special contract, express or implied, extends to all bills, cheques, and money entrusted or paid to him, and all securities deposited with him, in his character as a banker.⁶ In the case of money and negotiable securities, the lien is not prejudiced by any defect in the title of the customer, nor by equities of third persons, provided the banker acts honestly and without notice of any defect of title.⁷ But there is no lien for advances made after notice of a defect in the customer's title,⁸ or after notice of an assignment of the moneys or securities in the banker's hands.⁹ And in the case of securities which are not negotiable, the lien is confined to the rights of the customer herein, and is subject to all equities affecting them at the time when the lien attaches.¹⁰

A banker honoured a specific sum of money from a stockbroker, with whom he deposited, as security, negotiable instruments belonging to third persons. The banker dealt as a principal with the broker, having had many previous transactions with him and there was nothing to lead the broker to believe that the securities were not the property of the banker. Held, that the broker's general lien for the balance due to him from the banker attached upon the securities, although the banker had been guilty of gross fraud.¹¹

Factors.

A factor is an agent entrusted with the possession of goods for the purpose of sale.¹² He may buy and sell either in

1. *Brandao v. Barnett* (1846) 12 Cl. & F. 787, *Agra Bank's Claim* (1872) L. R. 8 Ch. 41.
2. *Kunhan v. Bank of Madras* (1895) 19 Mad. 234, *Official Assignee of Madras v. Ramaswami Chetty* (1920) 53 Mad. 747=59 I. C. 475.
3. *Re Bowes* (1886) 33 Ch. D. 586.
4. *Lease v. Martin* (1873) L. R. 17 Eq. 224.
5. *Misa v. Currie* (1876) 1 App. Cas. 554, *London Chartered Bank v. Whits* (1879) 4 App. Cas. 415.
6. *Bank of New South Wales v. Golburn Butter Factory* (1902) A. C. 548; *Misa v. Currie*, *supra*, *Brandao v. Barnett* (1846), 12 Cl. & F. 787.
7. *Solomons v. Bank of England* (1810) 13 East. 135, *Locke v. Prescott* (1863) 32 Beav. 261.
8. *Jeffrey v. Agra Bank* (1886) L. R. 2 Eq. 674.
9. *London & County Bank v. Ratcliffe* (1881), 6 App. Cas. 722.
10. *Jones v. Pepper corne* (1858), Johns. 480.
11. *Cotton L. J. in Stevens v. Biller* (1888) 25 Ch. D. 31, 87; *Emperor v. Parakh* (1925) 1 Luck. 188. A. I. R. 1926 Oudh 202 motor-car dealer entrusted with car for sale committed no offence by refusing to return the car to the Court of Wards, under whose management the client's estate had come, without payment of his account.

his own name, or in that of the principal, though "he usually sells in his own name, without disclosing that of his principal." The factor is said to have a "special property" in the goods consigned to him.¹ Private instructions to sell only in the principal's name or within fixed limits of price will not make him the less a factor or deprive him of his claim to lien.² The secretaries and treasurers of a company, who have made advances to the company and incurred expenses and made disbursements on behalf of the company in the conduct of its business, are not entitled to any lien on the property of the company in their possession.³ Similarly, a banian in Calcutta has no lien for a general balance of account in the absence of an express contract to that effect.⁴ Though advances made by a factor for sale confer a lien on him, they do not confer upon him the right to sell *invito domino*. To claim such a right there must be an agreement either express or to be inferred from the general course of business or from the circumstances attending the particular consignment.⁵ A factor to whom the goods have been consigned for sale and who has made advance against them, is not entitled to sell without the consent of the owners. Such a factor is entitled to maintain a suit for refund of advances before an actual sale of the goods, if he had waited a reasonable time for the sale to take place in the ordinary course of business even though the agreement between the parties was that the advances were to be payable from the sale proceeds.⁶

Conformably to the principle governing all general liens, a factor's lien, where it exists, applies only to debts due to the factor in that character; it does not extend to "debts which arise prior to the time at which his character of factor commences." But it extends to all his lawful claims against the principal as a factor, whether for advances, or remuneration, or for losses or liabilities incurred in the course of his employment in respect of which he is entitled to be indemnified.⁷

In order that the lien may attach, the goods must come into the possession, actual or constructive⁸ of the factor. If, for instance, a factor accepts bills on the faith of a consignment of goods which, by reason of the bankruptcy of the principal, are never received by him, he has no lien on the goods as against the principal's trustee in bankruptcy.¹⁰ Nor does the lien extend

1 *Baring v Corrie* (1818) 2 B & Ald 187, per Abbott C J at p 148, Holroyd J at p 148

2 *Stevens v Biller* (1883) 25 Ch D 31, 37

3 *In re Bombay Saw Mills Co* (1889), 13 Bom 314, 320

4 *Peacock v. Baijnath* (1891) 18 I A 78 18 Cal 573.

5 *Jafferbhoy v. Charlesworth* (1893) 17 Bom 520, 542

6 *Sheikh Mohamad v Oakley*, 11 L W I=55 I C 671

7 *Houghton v Mathews* (1803) 3 B & P 485, at p. 488

8 *Hammonds v Barclay* (1802) 2 East, 227, where the principal died during the currency of certain bills accepted by the factor on the faith of a consignment of goods; *Drinkwater v Goodwin* (1775) Cowp 297 (liability incurred by the factor as surety for the principal)

9 *Bryans v Nix* (1839) 4 M & W. 775 And see *Luscher B. Comptoir d'Escompte* (1876) 1 Q B. D. 709

10 *Kinloch v Craig* (1790) 3 T. R. 119, 783

to goods acquired otherwise than in his character of a factor,¹ or entrusted to him with express directions or for a special purpose inconsistent with the existence of a general lien.² Instructions to provide, out of the proceeds of a consignment, for a bill of exchange drawn by the principal on the factor in favour of a third person will exclude the factor's general lien unless he pays the bill of exchange.³

Wharfingers

The lien of a wharfinger is, generally speaking, only effective as regards claims against the owner of the goods. He has no lien as against a buyer for charges becoming due from the seller after he has had notice of the sale,⁴ and where it was agreed between a buyer and seller before the goods sold came to the hands of the wharfinger, that the contract of sale should be rescinded, it was held that he had no lien as against the seller for a general balance due to him from the buyer.⁵

Owners of a screwhouse who have a wharf as an accessory are not wharfingers.⁶

Creditor advancing money on the godown system

The distinction between the general lien of a bailee and the right of a creditor who advances money to accommodate his customers to buy goods and deposit them with him on what is called the 'godown system' is that the former merely confers on the lien holder the right to retain the goods until payment and does not carry with it the right of sale to secure the debt or indemnity, but the latter conveys with it the implication that the security shall, if necessary, be made effectual to discharge the obligation. In the one case a mere right of detention or reclaimer is given, and in the other special property in the chattel bailed is created in favour of the pledgee.⁷ A creditor who accommodates the customers by storing goods for the purchase of which he has advanced money has thus got higher rights than those of an ordinary bailee who has a general lien under S 171 as that creditor can resell the goods for the repayment of the money advanced.⁸

Attorney's lien

The solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 and 24 Vic Ch. 127 by which that lien was very much extended. By that law the solicitor had a lien for his costs or any funds or sum of money recovered for, or which be-

1 *Dixon v Stansfeld* (1850) 6 10 C B 395 (where a factor insured a ship on the principal's behalf it was held that his general lien did not extend to the policy of insurance)

2 *Spalding v Ruding* (1843) 6 Beav. 376 (bill of lading pledged to factor for specific amount); *Burn v Brown* (1817) 2 Stark 272 (certificate of ship's registry entrusted to factor for the purpose of paying duties at custom-house)

3 *Frith v Forbes* (1862) 4 D & G F & J 409; *Colvin v Hartwell* (1837) 5 Cl & F 484

4 *Burry v Longmore* (1840) 12 A & E 689

5 *Richardson v Goss* (1802) 2 B & P 119

6 *Miller v Naemayth's Patent Press Co* (1882) 8 Cal 312

7 *Alliance Bank of Simla v Firm of Ghamandilla* A I R 1927 Lah 408=101 I C 725

8 *Mercantile Bank of India v Sheigle & Co*, A I R 1930 Lah. 576= 125 I C 876

came payable to his client in the suit.¹ A solicitor has therefore at common law lien on the fruits of a judgment recovered by his exertions, for it would be inequitable to give the client the benefit of the solicitor's labour without paying for it.² This is a particular lien to which a solicitor is entitled in addition to the general lien which is dealt with in section 171 of the Indian Contract Act.³ Not being a general lien it is therefore not available for a general balance of account between the solicitor and attorney and his client, but extends only to the costs of recovering or preserving the property in suit, though he has the ordinary right to set off which one creditor has against another.⁴

Solicitors are entitled to enforce their lien in priority to the attaching creditors, so long as the moneys attached remained within the jurisdiction of the Court.⁵ But the solicitor's lien does not prevail against the claim of a mortgagee who advances money to the client to enable him to pay off prior incumbrances on the property in suit. The solicitor's lien does not attach to immovable property but, with this exception, it applies to property of every description including costs ordered to be paid to the client.⁶

It has been held that in addition to the particular or active lien, the attorney has a general or passive or retaining lien upon all moveables, deeds, documents, and so forth that come into his hands unless they came for a specific purpose which would be inconsistent with the right of retainer.⁷ The solicitor's lien also extends to the translation of documents made by the Court's translator at his expenses.⁸

In England a solicitor has a lien on his client's documents (not only deeds and law papers)⁹ entrusted to him as solicitor¹⁰ "for all taxable costs, charges, and expenses incurred by him as solicitor for his client; but he has no lien for ordinary advances or loans. His taxable costs, charges, and expenses would include money payments which he makes for his client in the course of his business, such as counsel's fees."¹¹ Taking a special security from the client is not necessarily an abandonment of the general lien, but it will be so if the circumstances are inconsistent with the continuance of the lien, and if the solicitor does not expressly reserve his lien. An intention to waive

1. *Devakabai v. Jafferson*, 10 Bom 248, *Haji Ismail v. Rabinbai*, 34 Bom 484, *Premakhdas v. Bural & Pyne*, 88 C W N. 1091, 1040.
2. *In re Born*, (1902) 2 Ch. 483; *In re Metre Cabs Ltd*, (1911) 2 Ch. 557, *Guy v. Churchill*, 85 Ch. D. 489; *Ghuam Motdeen v. Mohd. Omar*, A I R. 1931 Mad. 189.
3. *Tyabji Dayabhai v. Jetlu Debji*, 1 L R. 51 Bom. 855=105 I C 383, *Sadanand v. Parashram*, A I R 1928 Bom 108.
4. *Damodar v. Margon & Co*, A I R. 1934 Cal. 341=149 I C 331.
5. *Ved & Sopher v. Wagle & Co*, A. I. R 1925 Bom 351=88 I C 81.
6. *Sadanand v. Parashram*, A. I. R 1928 Bom. 108.
7. *Narendra v. Tarubala*, A. I. R. 1921 Cal. 67.
8. *Bai Kasserbai v. Narranji*, 4 Bom. 353.
9. *E. g. Cheques: General Share Trust Co v. Chapman* (1876) 1 C P. D. 771.
10. *Sheffield v. Eden* (1878) 10 Ch. D. 291 (solicitor mortgagee has no lien on mortgage; deed for costs of mortgage; here the deed is not the client's property at all); *Champernown v. Scott* (1821) 6 Mad. 92.
11. *Lindley L. J., Re Taylor, Stileman, and Underwood*, (1891) 1 Ch. 590, 596; "all such claims against the client as the taxing master has to consider," *per Kay L. J.* at p 599.

it will generally be inferred, having regard to the solicitor's duty to give his client full information.¹

If a client discharges his attorney, the latter has a lien on the client's papers for his costs, and he may object to a change of attorney, except upon the terms of the payment of his costs.² Where the change is with the attorney's consent and during the pendency of the suit, the first attorney has a lien on the costs recovered by the second attorney who recovered the costs of both attorneys with notice of the claim.³ But where the attorney⁴ discharges himself, he has no such right and cannot hold the cause papers till his costs are paid, or an undertaking given for their payment. He must give up the papers to the new attorney to whom the client proposes to go, only retaining his usual lien on such papers.⁵ But the lien is postponed and comes into operation only after the case ended and he loses his priority of lien in favour of the attorney acting subsequently.⁶ Where a firm of attorneys refused to proceed further in the conduct of a suit unless their clients paid them as promised a certain sum on account of costs incurred, *held*, that by doing so the attorneys discharged themselves, and the clients were entitled to an order for change of attorney without first paying the costs already incurred to the attorneys on record.⁷ Dissolution of a firm of attorneys operates as a discharge by the firm.⁸ An attorney who has discharged himself, cannot afterwards act for the opposite party, and Court can restrain him from doing so on an application made for that purpose.⁹

An order may be made upon the parties or either of them for direct payment of costs to which an attorney is entitled and in respect of which he has a particular lien.¹⁰ He may call in the equitable interference of the Court in case of any design to deprive the attorney of his costs. Thus to satisfy a compromise decree, a defendant cannot make a payment to the plaintiff behind the back of the plaintiff's attorney so as to deprive the attorney of his lien if the defendant had notice of it.¹¹ Nor after depositing the taxed costs can the defendant's claim be set off against the plaintiff for costs of another so as to defeat the plaintiff's attorney's claim to exercise his right of lien.¹² But in the absence of collusion to deprive the solicitor of his costs the Court will not interfere with a compromise although it may affect the solicitor's lien.¹⁰

1. *Re Taylor, Stileman, and Underwood*, supra, at pp. 597, 601; *Re Douglas Norman & Co.* (1898) 1 Ch. 199. The leading earlier authorities are *Cowell v. Simpson* (1809) 16 Ves. 275. and *Stevenson v. Blakelock* (1813) 1 M. & S. 535.

2. *Basanta v. Kusum*, 4 C. W. N. 767, see also *Atul v. Soshi*, 29 Cal. 63; *Bai Kassarbai v. Narranji*, 4 Bdm. 353.

3. *Orr v. Narendra Nath*, 19 Cal. 368.

4. *Re Mc Corkindale*, 6 Cal. 1.

5. *Atul v. Soshi*, 29 Cal. 63.

6. *Anglo Indian Drug & Chemical Co. v. Sugandha Perfuming Co.*, 62 Cal. 464; *Pankaj v. Sudhir*, A. I. R. 1934 Cal. 58.

7. *Mohashpore Coal Co. v. Jotindra*, 40 Cal. 386.

8. *Re Mc Corkindale*, 6 Cal. 1.

9. *Ramiall v. Moonia*, 6 Cal. 79.

10. *Premabhadra v. Bural & Payne*, A. I. R. 1935 Cal. 168.

11. *Khetter Krieto v. Kally Prosunno*, 25 Cal. 387.

12. *Haridas v. Kaluram*, 63 Cal. 746.

Section 221 of the Indian Contract Act relates to the particular lien of the agent. In order that an agent may have a valid lien on the property in his hands, the following conditions *inter alia* must be satisfied: (1) there should be no arrangement inconsistent with the retention of such property in the exercise of his lien; (2) the property on which the right to lien is claimed should belong to the principal to the knowledge of the agent; (3) it should have been received by the agent in his capacity as agent during the course of his ordinary duties as agent; and (4) the agent should be holding the property for and on behalf of his principal and not for and on account of any known third party.¹ Thus, where A agreed to sell goods to B to be accounted for in payment of a debt to B, and C with notice agreed to sell the goods as factor, C could not retain the amounts realised toward any debt due to himself from A.² Then again, property held by an agent for a special purpose cannot be subjected to a lien the existence of which is inconsistent with such purpose.³

Conditions of agent's lien

The common law lien, as already noted, being a mere right of retainer, it follows that the exclusive possession of the property by the person claiming the lien is indispensable to its existence and continuance.⁴ If the person held the property in subordination to the will and control of another, no right of retainer attaches. No lien exists, therefore, in favour of the mere workman or servant of the contractor.⁵ But the possession of such workman or servant is the possession of his master and is sufficient to maintain the latter's right of lien.⁶ In *Taylor v. Robinson*,⁷ A bought goods as a factor for and on behalf of B, and it was agreed that the goods should remain upon the premises of the seller at a rent to be paid by B. After a time A was requested by the seller to remove the goods, but did not do so. Subsequently, without B's authority or instructions, A removed the goods to his own premises and at about the same time a petition in bankruptcy was presented against B. Held, that the possession of the goods continued in B, and that A had therefore no lien upon them. So, where a factor accepted bills upon the faith of a consignment of goods, and both he and the principal became bankrupt before the arrival of the cargo, it was held that the factor's trustee in bankruptcy had no lien upon the cargo, and therefore no claim against the principal's trustee, who had sold the cargo and received the price, because the goods had never been in the factor's possession.⁸

The property must be in the possession of the agent.

Constructive possession of goods by the agent is, however, sufficient for the purpose of establishing his lien thereon.⁹ And an agreement, made for valuable consideration, to hand over a bill of lading to an agent, for the purpose of giving him a

1. *Pestons v. Rajs Javerchand*, A I R 1983 Sind 235=150 I C 483

2. *Weymouth v. Boyer*, (1792) 90 E R 414

3. *Mechem*, § 1686, *Katlar*, p 486

4. *Hollingsworth v. Doe*, 19 Pick (Mass) 228, *Wright v. Terry* 23 Fla 160

5. See *Katlar*, p 486

6. (1790), 3 T. R 119, 788, H L

7. *Kinloch v. Craig* (1790), 3 T R 119, 788, H L

8. *Bryans v. Naz* (1889), 4 M & W 775

security on the goods represented thereby, gives the agent a right, in equity, to the bill of lading and possession of the goods, as against the principal and his creditors¹.

Where the goods, although in custody of the agent, are in the order and disposition of the principal, the agent cannot claim an effective lien on them in as much as they are considered in the constructive possession of the principal and the agent has only a physical custody thereof. So where A was appointed by a Glasgow firm to manage a warehouse in London, and it was expressly agreed that he should have a lien upon the goods stored in the warehouse, and the business was carried on, and the goods were stored, in the name of the firm, who became bankrupt, it was held that the goods were in the order and disposition of the firm, and that in consequence of the "order and disposition" clause of the Bankruptcy Act, A's lien was not effective, though he had physical custody and control of the goods.²

The possession must be lawful

A lien cannot be acquired by a wrongful act. If an agent obtain goods from his principal by misrepresentation, he has no lien thereon, though the circumstances in other respects be such that he would have had a lien if the goods had been obtained lawfully³. So, where an agent of the managing owner of a ship made the freight payable to himself without authority to do so, it was held that he had no lien on the freight received by him for a debt due from the principal.⁴ So, a solicitor's general lien does not attach on documents or chattels obtained by him without the authority of the client.⁵

It is thus clear that if the person claiming the lien acquires possession of the property on which it is claimed by misrepresentation, force or fraud or from a servant or agent who had neither power nor right to deliver possession the claim is not maintainable⁶.

The possession of property must be acquired in the same capacity as that in which the lien is claimed.

In order that the right be available to the agent it is also necessary that the possession of the property on which the lien is claimed, must be obtained in the same capacity in which the dues have accrued for which such lien is claimed. A factor insures a ship on his principal's behalf, the transaction being quite distinct and separate from his duties as factor. His general lien does not extend to the policy of insurance, because he did not acquire it in the capacity of factor.⁷ So, if a policy is left merely for safe custody in an agent's hands, he has no general lien thereon for advances.⁸ So, a banker's lien for the general balance due to him is confined to property deposited with him in the capacity of a broker, and does not

1. *Ex p. Barber* 3 M. D. & De G 174, *Lutcher v Comptoir d' Escompte* (1876), 1 Q. B. D. 709.

2. *Hoggard v Mackenzie*, 25 Beav. 495.

3. *Madden v Kempster* (1807), 1 Camp. 12.

4. *Walshe v. Provan* (1855), 8 Ex. 843.

5. *Gibson v. May*, 102 R. R. 246; *Wirkens v Townshend*, 32 R. R. 221; *Leeds v. Leete*, 48 L. J. P. C. 61.

6. See *Katuar*, p. 488.

7. *Dixon v. Stansfield* (1850), 10 C. B. 398.

8. *Muir v. Fleming* (1823), D. & R. N. P. C. 29.

extend, e.g., to boxes of securities left with him merely for safe custody¹. But it extends to all bills, cheques, and money paid into the bank, and to all documents and securities deposited with him as a banker¹. For the same reasons the general lien of a solicitor does not attach on an original will left in his hands by his client,² nor on documents coming in his possession as mortgagee of his client's estate³ or as town clerk⁴ or as teward⁵, or deposited with him merely for safe custody.⁶

A mere creditor happening to have the goods of his debtor in his possession has no lien thereon to secure payment of a debt.⁷ Nor does the mere fact that a person occupies a position or pursues a calling, in respect of which a lien ordinarily attaches, gives him a lien upon property which chanced to be in his possession unless the possession has been acquired by virtue of his position or in the pursuit of the calling in which he is engaged⁸. Thus a factor can only claim a lien upon goods which come into his possession as factor⁹; an attorney only upon deeds and papers which come into the hands in the character of an attorney,¹⁰ and a broker only upon the property which was delivered to him in that capacity¹¹.

The lien of an agent is confined to what is due to him as such agent, and does not extend to debt, incurred before the commencement of the agency. A, a factor, sold goods in his own name on B's behalf to C. C subsequently sent goods to A for sale, never having employed him as a factor before C became bankrupt. Held, that A had no lien upon C's goods for the price of the goods sold by him on B's behalf.¹² So, the general lien of a solicitor is confined to taxable costs, charges and expenses and does not extend to ordinary advances or any other claims made otherwise than in the capacity of a solicitor¹³. Nor does the lien of a solicitor upon deeds handed to and retained by him personally extend to the general bill of costs of his firm¹⁴.

Lien of an agent confined to what is due to him as such

As the right to a lien is available to the agent only in the absence of a contract to the contrary, where there is a contract or agreement inconsistent with the accrual of the right, the agent has no right to retain the property¹⁵. Where a life policy was deposited at a bank, with a memorandum charging it with overdrafts not exceeding a specified amount, held, that the banker's general lien was excluded by the special contract, such

Must be no agreement inconsistent with the lien.

1. *Misa v. Currie* (1876) 1 App. Cass. 551, *London Chartered Bank v. White* (1879), 1 App. Cas. 413, *Scott v. Franklin* (1812) 15 East 428.
2. *Baile v. Symes*, 1 T. & B. 87, *Georges v. Georges* 18 Ves. 294.
3. *Pelly v. Wathen*, 7 Hare 351, *Sheffield v. Eden*, 10 Ch. D. 291 C.A.
4. *Re v. Sankley* 5 A. & E. 423.
5. *Champervon v. Scott*, 6 Madd. 98.
6. *Exp. Fuller, re Long*, 16 Ch. D. 617.
7. *Allen v. Meguire*, 15 Mass. 496.
8. See *Per Jarvis C.J.* in *Dixon v. Stansfield*, 10 C.B. 396.
9. *Drinkwater v. Gundry*, 1 Cowp. 251.
10. *Sterenson v. Blakelock*, 1 M. & S. 535.
11. *Dixon v. Stansfield*, *supra*.
12. *Houghton v. Matthews*, 3 B. & P. 485.
13. *Re Taylor, Exp. Payne Collier*, (1891) 1 Ch. 590.
14. *Re Gough*, 70 L. T. 725; *Re Forshaw*, 17 L. J. Ch. 61.
15. See *Mechem*, § 1690.

contract being inconsistent with the existence of a general lien on the policy.¹ So, where a partner deposited a lien with a banker to secure a particular advance to his firm, it was held that the banker had no lien thereon for the general balance due from the firm.² If a factor expressly agrees to deal in a particular way with the proceeds of goods deposited with him for sale, his general lien is thereby excluded.³ But the lien is not excluded unless the express contract is clearly inconsistent with its existence.⁴ Thus, where certain securities were deposited with stockbrokers for a specific loan, and they were given a power of sale, it was held that their general lien extended to such securities.⁵ So, an agreement that there shall be monthly settlements does not affect the lien of an insurance broker for premiums upon policies in his hands.⁶ So, the general lien of a factor is not excluded merely because he acts under special instructions to sell in his principal's name and at a particular price.⁷

A consigns goods to B, who transfers the bill of lading to his factor C, to secure £ 1,000. B becomes bankrupt. C has no lien on the bill of lading for a general balance due from B, and A may stop the goods *in transitu*, subject to C's claim for £ 1,000.⁸

No lien on property intrusted to agent for special purpose inconsistent therewith.

Certain exchequer bills were deposited at a bank, to be kept in a box under lock and key, the key being kept by the customer. The bills were subsequently intrusted to the banker, with instructions to obtain the interest on them, and get them exchanged for new bills, and to deposit the new bills in the box as before. Held, that the banker's lien did not attach either on the original bills or on those for which they were exchanged, the special purpose for which they were placed in his hands being inconsistent with a right of general lien.⁹

A consigns goods to B for sale, and in sending B the bill of lading tells him that those goods will cover a bill of exchange which he has drawn in favour of C, and asks him to duly honour such bill. C presents the bill to B, who refuses to accept it. The cargo duly arrives, and A becomes bankrupt. B, cannot claim a general lien on the cargo, unless he pays the bill of exchange¹⁰. Where an agent accepts goods with express directions to apply them or their proceeds in particular way, he cannot set up his general lien in opposition to those directions¹⁰. So, if A sends bills to B with instructions to discount them,

1. *Re Bowas, Strathmore v. Vane* (1886), 33 Ch. D. 586. See also *Ex p. M. Kenna* (1861) 30 L. J. Bk. 20, *Vanderzee v. Willis* (1789), 3 Bro. C. C. 21.
2. *Wolstenholme v. Sheffield Bank* (1886), 54 L. T. 746.
3. *Walker v. Birch* (1795), 6 T. R. 258.
4. *Brandao v. Barnett* (1846), 12 C. & F. 787, H. L. *Re European Bank, Agra Bank's Claim*, (1872) L. R. 4 Ch. 41; *Davis v. Bowdler* (1794), 5 T. R. 488.
5. *Jones v. Peppercorne* (1858), Johns. 430. See also *Re London and Globe Finance Corp.*, (1902) 2 Ch. 416.
6. *Fisher v. Smith* (1878), 4 App. Cas. 1.
7. *Stevens v. Biller* (1883), 25 Ch. D. 31; *König v. Brandt* (1901), 84 L. T. 748, C. A.
8. *Spalding v. Ruding* (1848), 12 L. J. Ch. 503.
9. *Brandao v. Barnett* (1846), 12 C. & F. 787.
10. *Frith v. Forbes* (1862), 82 L. J. Ch. 10; *Colvin v. Haistrell* (1837), 5 Cl. & F. 484; *König v. Brandt* (1901), 84 L. T. 748, C. A.

and apply the proceeds for a particular purpose, and B does not discount them, but receives the amount thereof after A has become bankrupt, A's trustee in bankruptcy is entitled at his option to recover the value of the bills in trover, or to recover the proceeds as money had and received to his use, and B has no right to set off a debt due to him from A¹.

A factor, who acted as such for the owners of a ship, asked the master to let him have the certificate of registry for the purpose of paying certain duties at the custom house. Held, that his general lien as factor did not attach on the certificate².

A deed, dealing with two distinct properties, was deposited at a bank, with a memorandum pledging one of the properties to secure a specific sum and also the general balance due to the banker. Held, that the banker had no lien upon the other property, the deed having been deposited with a specific intention inconsistent therewith³. So, a banker has no lien upon muniments of title casually left at the bank after a refusal by him to advance money upon their security⁴. So, a solicitor who received a certain sum of money to pay off a certain mortgage was held not entitled to retain it against the costs incurred by him as the money was entrusted to him for a particular purpose inconsistent with such lien⁵.

Where, however, the purpose for which property is entrusted to an agent is not inconsistent with the accrual of the right, the mere fact that it was entrusted for a particular purpose does not prevent the attachment of a lien thereon⁶. So, a solicitor's general lien for costs, has been held to attach on papers deposited with him for a particular purpose where such purposes did not exclude by express agreement or was not inconsistent with the attaching of such lien thereon⁷. It also attaches upon deeds, of which he is permitted to retain possession, after the special purpose for which they were left with him had failed⁸.

An agreement to give credit or a special contract providing a particular mode of payment or the taking of a note, acceptance or other similar instrument payable at a future time or an agreement to deliver property before payment or before the time of payment arrives are contracts to the contrary and preclude the accrual of the right; but an agreement to pay a fixed price is not such contract to the contrary⁹.

1 *Buchanan v. Findlay* (1829), 9 B. & C. 738; *Seligmann v. Huth* (1877), 37 L. T. 488, *C. A. Hill v. Smith* (1844), 12 M. & W. 618.

2 *Burn v. Brown* (1817), 2 Stark. 272.

3 *Wylde v. Radford* (1864), 33 L. J. Ch. 51.

4 *Lucas v. Dorrien*, (1817), 7 Taunt. 278.

5 *Cullinan*, Re. 27 Beav. 51; *Re Clark*, Ex p. Newland, 4 Ch. D. 515. The solicitor has no general lien on such money even if the purpose for which it was entrusted to him fails or is fulfilled leaving a balance in his hands. In either case he must return it to the principal and is not entitled to retain it in lien of a debt due to him from the principal. *Stumore v. Campbell* (1892) 1 Q. B. 814; *Re Mid-Kent Fruit Factory* (1896) 1 Ch. 567.

6 *Colmer v. Eds*, 40 L. J. Ch. 185.

7 *Ex p. Pemberton*, 18 Ves. 282.

8 See *Katlar*, p. 494, and the authorities cited therein.

Waiver of
the right.

Where the agent enters into a contract or agreement which is inconsistent with the existence or continuance of the lien¹ or conducts himself in such a way as is inconsistent therewith, he waives his right to the lien². Cases of contracts or agreements have already been dealt with. The case of waiver by conduct is presented where the person to whom the right to lien enures refuses to deliver property in pursuance of a claim of title in himself or by virtue of some other claim quite independent of and distinct from his lien³. Where one wrongfully converts property upon which he has a lien, such lien is extinguished⁴. A voluntary surrender of the property over which the right is claimed to the owner or to some one on his behalf terminates the lien unless it is consistent with the contract, course of business or intention of the parties that it should continue⁵. Having once voluntarily relinquished the property, the party cannot regain his lien by recovering possession of the goods without the consent or agreement of the owner⁶. If, however, the property be taken from the possession of the party, claiming the lien, by fraud or misrepresentation the lien is not lost⁷ and will revive if his possession is restored.⁷ The lien is not lost by a mere temporary parting with the possession for a special purpose, when there was no intention to relinquish or release it⁸.

Lien contin-
ued to rights
of principal

It has been held under the English law that the possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against third persons, the right or power to create the lien, and except in the case of money or negotiable securities, and subject to any statutory provision to the contrary, is confined to the rights of the principal in the goods or chattels at the time when the lien attaches, and is subject to all rights and equities of third persons available against the principal at that time⁹. So, where a mortgagee is paid off, and the property is reconveyed to the mortgagor, the mortgagee's solicitor has no lien as against the mortgagor on the title deeds for costs due from the mortgagee, except the cost of the reconveyance, even if such costs were incurred in respect of the mortgaged property, *e. g.* the costs of an attempted sale by the mortgagee.¹⁰ So, where a mortgagor borrowed the title deeds from the mortgagee and sold the property, it was held that the solicitor of the mortgagor, to whom the deeds were handed for the purpose of completing the sale, had no lien thereon for costs due from the mortgagor in respect of other transactions.¹¹

A sells goods to B, and ships them to his order. Before the goods arrive, A and B agree to rescind the contract for sale.

1. *Forth v Simpson*, 18 L. J. Q. B. 263, *Hov v. Kitchner*, 11 Moo. P. O. 21.
2. *Re Nicholson Ex p. Quinn*, 53 L. J. Ch. 302, see also *Re Lawrence Bowker v. Austin* (1941) 1 Ch 556.
3. See *Kahar*, p. 494, and the authorities cited therein.
4. *Peoples Bank v. Frick Co.* 13 Okla. 179.
5. *Walker v. Appleman*, 44 Ind. App. 699 (Am.)
6. *Neven v. Roup*, 8 Iowa 207.
7. *Wallace v. Woodgate*, 1 C. & P. 575.
8. *Mechem*, §. 1688.
9. *Bowstead*, Article 75, p. 188.
10. *Re Llewellyn*, (1891) 3 Ch. 145; *Wakefield v. Newbon* (1844), 6 Q. B. 276.
11. *Young v. English* (1843), 7 Beav. 10.

The wharfinger cannot, on the arrival of the goods at his wharf, claim a lien on them as against A, for a general balance due from B¹. So, a wharfinger has no lien on goods, as against a buyer, for charges becoming due from the seller after the wharfinger has had notice of the sale².

Where an owner of land, who had deposited the title-deeds at a bank as security for his general balance, sold the land to a person who had notice of the terms of the deposit and the banker inspite of the notice of such sale continued the account and made fresh advances the owner paying sums from time to time, it was held that the purchaser having paid the purchase money by instalments without notice of the fresh advances was not affected by such advances and the banker could not claim a lien therefor to the prejudice of the purchaser's right to the land³.

Goods are consigned to a factor for sale, the principal having committed an act of bankruptcy. The factor, with notice of the act of bankruptcy, advances money to the principal. The factor has no lien on the goods for the advances, and having sold them and received the proceeds, must account for such proceeds to the trustee in bankruptcy, because the principal had no power after the act of bankruptcy to create any lien⁴.

Where deeds are deposited with a solicitor by a tenant for life the solicitor has no lien on the deeds as against the remainder-man⁵. The lien of a solicitor upon deeds and papers deposited with him by a client is confined to the rights of the client therein, and is subject to all rights and equities of third persons available against the client⁶. So, a solicitor or other agent has no lien, as such, on the separate property of a partner for the obligations of the firm⁷.

The case of a Hindu reversioner who succeeds to the estate of a Hindu on the death of his widow or other life-estate holder is, however, different. In such case the widow or any other life-estate holder represents the full estate with a limited power of disposition, and consequently if the creditor or agent has advanced the money for a legal necessity for which the life-estate holder is authorised to dispose of the property beyond the life estate, the creditor as agent can claim a lien against the reversioner⁸.

The directors of a building society, which has no borrowing powers, overdraw the banking account of the society, and agree

1. *Richardson v. Goss* (1802), 9 B. & P. 119.
2. *Barry v. Longmore* (1840), 12 A. & E. 689.
3. *London and County Bank v. Ratcliffe* (1881), 6 App. Cas. 722.
4. *Copland v. Stein*, 8 T. R. 199. If, however, the factor had made advantages without notice of the act of bankruptcy and before the date of the receiving order he would have a lien against the trustee in bankruptcy for such advance. See Bankruptcy Act, 1914 (4 & 5 Geo. 5, C. 59), s. 45.
4. *Turner v. Letts* (1855), 24 L. J. Ch. 698; *Ex p. Newbitt* (1805), 2 Seb. & Lef. 279.
5. *Hollis v. Clavidge* (1813), 4 Taunt 807; *Pratt v. Vizard*, 5 B. & A. 808; *Pelly v. Wathen*, 1 De. G. M. & G. 16; *Orenham v. Esdaile*, 2 Y. & J. 493; *Furlong v. Howard*, 2 S. & L. 115.
7. *Turner v. Deane* (1849), 18 L. J. Ex. 843; *Watts v. Christie*, (1849), 18 L. J. Ch. 173.
8. *Jogendra v. Apurva*, 13 C. W. N. 1190.

for the general balance. The transaction is *ultra vires*, and the banker has no lien on the deeds for the overdraft¹.

It has also been held under the English law that no solicitor or other agent can have a lien on the share register or minute book of a joint stock company, because the directors have no power to create any lien that could interfere with the use of such register or book for the purposes of the company². So, no lien can attach upon such books of a company as, under the articles of association or the Companies Acts, ought to be kept at the registered office of the company³. And where documents come into the hands of a solicitor pending the winding-up of a company, he cannot claim any lien thereon that would interfere with the winding-up. But the fact that a company has issued debentures as a floating security does not prevent an agent from acquiring a lien on the title deeds of the company, and such a lien has priority to the claims of the debenture holders⁴.

Similarly, a solicitor or other agent employed by trustees has no lien on the trust funds for his expenses⁵. So, a solicitor employed by a trustee in bankruptcy has no lien for costs on property of the bankrupt recovered by him as such solicitor.⁶

Money and negotiable instruments excepted.

The lien of an agent upon money or negotiable securities deposited with him by or in the name of the principal is not affected by the rights or equities of third persons, and is as effectual as if the principal were the absolute owner of such money or securities, provided that at the time when the lien of the agent attaches he has no notice of any defect in the title of the principal thereto⁷.

A banker borrowed a specific sum of money from a stock-broker, with whom he deposited, as security negotiable instruments belonging to third persons. The banker dealt as a principal with the broker, having had many previous transactions with him, and there was nothing to lead the broker to believe that the securities were not the property of the banker. Held, that the broker's general lien for the balance due to him from the banker attached upon the securities although the banker had been guilty of gross fraud⁸. So, the general lien of a banker upon negotiable instruments deposited with him is not affected by the circumstance that the customer who deposits them is acting as agent for a third person⁹, nor by equities between the

1 *Cunliffe v. Blackburn, Building Society* (1884), 9 App Cas 857. He is, however, in equity, entitled to hold them as security for so much of the money advanced as he can show to have been actually applied in payment of the debts and liabilities of the Society. *Ibid*.

2 *Re Capital Ins. Ass., ex p. Beall* (1893), 24 Ch D 408, *Re Rapid Road Transit Co.*, (1909) 1 Ch 96.

3 *Re Anglo-Maltese Dock Co.* (1885), 54 L. J. Ch. 730.

4 *Branton v. Electric Engineering Corp.*, (1892) 1 Ch. 484. See *Re Dec. Estates*, (1911) 2 Ch. 85.

5 *Stanlar v. Evans* (1887), 8 T L R 215.

6 *Re Humphreys, ex p. Lloyd-George* (1898) 1 Q. B. 520. See also *Meguerditchian v. Lightbound*, (1917) 2 K B. 298.

7 *Bowstead*, Art 75, p 188.

8 *Jones v. Peppercorn* (1868) Johns, 490.

9 *Brandoo v. Barnett* (1846), 12 C. & F. 787, H. L.; *Baker v. Nottingham Bank* (1891), 60 L. J. Q. B. 542; *Bank of New South Wales v. Goulburn Valley Butter Factory*, (1902) A. C. 543.

customer and third persons.¹ But an agent has no lien upon a negotiable instrument, as against the true owner, for advances made after notice of a defect in the title of the principal.² So, a banker has no lien on a fund in his hands, in respect of any claims arising after notice of an assignment of the fund to a third person³, or after notice that the fund belongs to a third person⁴.

In the absence of an agreement to the contrary lien can be claimed only for debts or dues which are certain and liquidated and not for contingent, prospective or speculative damages or liabilities⁵. The debts must have been incurred by the express or implied authority of the principal and not as the result of the agent's own wrong, neglect or breach of instructions⁶. They must also have been incurred for lawful and legitimate purposes and must be as a matter of right and not as a mere matter of favour⁷. In the absence of a contract to the contrary it attaches only for debts arising or incurred in transactions had in the particular character by virtue of which the agent claims the lien and not from other and dissimilar transactions⁸ and the demand must be due from the person whose goods are sought to be retained and not from a stranger, and must accrue to the agent who claims the lien⁹.

Sums for which lien can be claimed.

An agent who has made himself liable for the price of goods consigned by him to his principal, by purchasing them in his own name and on his own credit may stop them while in transit if the principal becomes insolvent¹⁰. This rule is based on the principle that the relation of the parties in such cases is rather that of vendor and vendee than of the principal and agent.¹¹ Where, however, the agent is indebted to the principal for a larger sum on a general balance and the consignment has been made only to cover such balance¹² or where the agent is only a surety for the price of the goods and so not liable in the first instance¹³, this right of stoppage in transit is not legally available to him¹⁴. So also the right is lost, if the agent

Agent's right of stoppage in transit

1. *Misa v. Currie* (1876), 1 App. Cas. 554; *Johnson v. Roberts*, (1875) L. R. 10 Ch. 506.
2. *Solomons v. Bank of England* (1810), 18 East 195; *De la Chaumette v. Bank of England*, (1829), 9 B. & C. 208. And see *Redfren v. Rosenthal* (1902), 86 L. T. 855, C. A.
3. *Jeffreys v. Agra Bank* (1866), L. R. 2 Eq. 674.
4. *Locke v. Prescott* (1863), 32 Beav. 261; *Ex p. Kingston, re Gross* (1871), L. R. 6 Ch. 632; *Cuthbert v. Roberts*, (1909) 2 Ch. 226.
5. Story on Agency, §. 364.
6. See *Meehem*, §. 1683.
7. Story, §. 365.
8. See *Meehem*, §. 1689.
9. Story, §. 365.
10. *Meehem* §. 1697; See Katkar, p. 499 and the authorities cited therein.
11. *Newhall v. Vargas*, 13 Me. 93; See also Halsbury, Vol. I, 2nd Edn. Art. 444, p. 267.
12. *Wiseman v. Vandepuut*, 2 Vern. 208; *Vertue v. Jewell*, 3 Camp. 81; *Meehem*, §. 1698.
13. *Stiffken v. Wray*, 6 East. 371. See, however, the English Mercantile Law Amendment Act, (19 and 20 Vict. C. 97, §. 5) and *Imperial Bank v. London etc. Dock Co.*, 5 Ch. D. 495 to the contrary.
14. See *Meehem*, §. 1698.

in pursuance of a contract between the principal and a third person who has bought the goods of the principal and paid him for them, delivers the goods to a carrier to be shipped to the purchaser, taking the shipping receipt in the name of the principal, although the principal fails to pay the agent for goods, before they are delivered to the purchaser.¹ The agent's right of stoppage in transit is to be exercised in the same manner and is subject to be defeated by the same contingencies as in the case of the exercise of the same right by any other vendor².

Lien of sub-agents.

Except where otherwise expressly provided by statute (as for example by the Factors Act, 1889 in England), a sub-agent who is employed without the authority, express or implied, of the principal, has no lien, either general or particular, on his property for any remuneration, indemnity or disbursement to which he may be entitled against his employer³. So, in England, before the enactment of the Factors Act, 1889, it was held that sub-agent to whom the factor delegated his duty without the assent of the principal was not entitled to claim a lien on the principal's goods even for the duties which he had to pay in respect thereof⁴. Where the employment is not authorised expressly or by implication the principal is not liable for any remuneration, indemnity or disbursements which the sub-agent may be entitled to claim against his employer. Hence the sub-agent is not entitled to retain the property of the principal in his possession for such remuneration, indemnity or disbursements. The criterion is whether the agent could himself claim from the principal the amount, if he had paid the sub-agent. If the appointment of the sub-agent is not authorised expressly or by implication by the principal the agent cannot recover anything which he may have paid to the sub-agent by way of his remuneration, indemnity or other charges.⁵

Where a sub-agent is appointed by an agent with the authority, express or implied, of the principal, he has the same right of lien against the principal in respect of debts and claims arising in the course of the sub-agency, on property coming into his possession in the course of the sub-agency, as he would have had against the agent employing him if the agent had been the owner of the property; and this right is not liable to be defeated by a settlement between the principal and agent to which the sub-agent is not a party⁶. For instance, where an agent, on behalf of his principal, employs an insurance broker to effect a policy, the broker being aware that the agent is acting for a principal, and the principal pay the agent the amount of the premiums due in respect of the policy, the broker, not withstand-

1. *Gieys v. Richmond & Danville R. R. Co*; 39 Am. Dec. 709.

2. *Mechem*, §. 1699.

3. *Bowstead*, Art. 76, p. 192; *Halsbury*, Vol. I, Art. 443, p. 267.

4. *Solly v. Rathbone*, (1814) 2 M. & S. 298.

5. See *Katlar*, pp. 500, 501.

6. See *Bowstead*, Art. 76, p. 192; *Fisher v. Smith* (1878) 4 App. Cas. 1 (policy broker's lien for premiums effective against principal if agent employing him though he knew him to be an agent, and though the principal had paid the agent the amount due for premium); *Blackburn v. Kymer* (1814), 5 Taunt. 584; *Cahill v. Dawson* (1857), 26 L. J. C. P. 253; *Mildred v. Maepsons* (1883), 8 App. Cas. 874.

ing such payment, has a lien upon the policy for premiums in respect thereof, paid by him, or for which he is liable¹. But he has no lien, as against the principal, for a general balance due from the agent in respect of other transactions.² So also, it has been held that as against the solicitor employing him, a London agent has a general lien upon all moneys recovered and documents deposited with him in the course of his employment,³ but as against the client, his general lien is limited to the amount due from the client to the country solicitor.⁴ As against both the country solicitor and the client, he has a lien upon money recovered and documents deposited with him in a particular suit, for the amount of his agency charges and disbursements in connection with that suit.

If a sub-agent properly appointed has no knowledge that the person employing him is an agent, but believes on reasonable grounds, at the time when the lien attaches, that the agent is the owner of the property and is acting on his own behalf, the sub-agent's lien, whether general or particular, is available against the principal to the same extent as it would have been against the agent if the agent had been the owner of the property; and the lien is not in such a case limited to debts and claims arising in the course of the sub-agency.⁵ An agent, on behalf, and with the authority, of his principal, employs an insurance broker to effect a policy, the broker having no notice, and being unaware, that he is dealing with an agent. The broker has a lien on the policy for the general balance due to him from the agent, and is entitled to apply the proceeds of the policy in payment of such balance, notwithstanding that he has, in the meantime, received notice of the principal's rights.⁶

A, a commission agent, employed B, a broker, to buy certain goods, B having no knowledge that A was acting as an agent. B bought and paid for the goods and retained the warrants therefor. A was in fact acting for C, and C paid A for the goods. B, on A's instructions, resold the goods, and applied the proceeds in reduction of a running account between himself and A. In an action by C against B for converting the goods, it was held that B was not liable, because at the time of the sale he had a lien on the goods for the balance due to him from A.⁷

A employed B to collect general average contributions under an insurance policy. B, in the ordinary course of business, employed C, an insurance broker to collect the contributions, C collected the contributions and B became bankrupt. Held,

1. *Fisher v Smith* (1878), 4 App. Cas. 1.
2. *Mildred v Morspons* (1883), 8 App. Cas. 874, *Fairfield Shipbuilding Co. v. Gardner* (1911), 104 T. T. 288, *Near East Relief v King* (1930) 2 K. R. 40.
3. *Lawrence v Fletcher* (1874) 12 Ch. D. 858, *Bray v. Hine* (1818) 6 Price 208; *Re Jones and Roberts* (1905) 2 Ch. 219.
4. *Ex p. Edwards, re Johnson* (1881), 8 Q. B. D. 262; *Moody v Spencer* (1822), 2 D. & R. 6, *Waller v Holmes* 1860, 1 Johns. & H. 239.
5. *Dicas v Stockley* (1836), 7 C. & P. 587, *Lawrence v. Fletcher*, supra.
6. See Bowstead, Art. 76, p. 192., *Mann v. Forrester* (1814), 4 Camp. 60; *Mosses v. Henderson* (1801), 1 East 335; *Westwood v. Bell* (1815), 4 Camp. 349.
7. *Mann v. Forrester*, (1814), 4 Camp. 60.
8. *Taylor v Kyther* (1832), 8 & Ad. 920.

in an action by A against C for the contributions, as money had and received to his use, that C was entitled to set off the amount of a debt due to him from B¹.

If, however, the sub-agent is aware of the existence of a principal at the time when the lien attaches, his general lien in respect of debts and claims not arising in the course of the sub-agency is available against the principal only to the extent of the lien, if any, to which the agent employing him would have been entitled had the property been in his possession².

It has also been held under the English law that where a sub-agent is appointed by an agent with the authority, express or implied, of the principal, the sub-agent has the same right of general lien on the goods and chattels of the principal in respect of all claims, whether arising in the course of the sub-agency or not, as he would have had against the agent if the agent had been the owner of the goods and chattels; provided that, as against the principal, such right of lien is available only to the extent of the lien, if any, to which the agent would have been entitled if the goods and chattels had been in his possession.³

Ratification
of acts of the
sub-agent by
the principal.

As already noted, when the principal ratifies the acts of the sub-agent he thereby clothes those acts with all the proper accompaniments of an original authority⁴. Thus, a sub-agent who is employed by an agent to perform a particular act of agency without the priority or consent of the principal, may also acquire a lien upon the property thus coming into his possession against the principal for his commissions, advances, disbursements and liabilities thereon, if the principal adopts his acts or seeks to avail himself of the property or proceeds acquired in the usual course of such sub-agency;⁵ for the principal will not be allowed to avail himself of the benefits of the transaction without at the same time subjecting himself to the burdens arising therefrom⁶.

How an
agent's lien
may be en-
forced.

As a lien is ordinarily nothing more than a right of retention of the property, the party entitled to the lien cannot ordinarily sell or dispose of the property in order to satisfy his lien unless with the consent of the owner either express or implied from the nature and objects of the very transaction.⁷

Thus for example, if goods are consigned to a factor for sale, and he made advances upon them, he is, of course invested with a right to sell them, and may out of the proceeds satisfy his lien, or use it by way of set off⁷. So, where goods are con-

1. *Montagu v Forwood*, (1893) 2 Q. B. 350, C. A.

2. *Mildred v Maspons* (1883) 8 App. Cas. 874, *Levy v Barnard* (1818) 2 Moo. 84, *Snook v Davidson* (1809), 2 Camp. 218, *Ex parte Edwards* (1881) 8 Q. B. D. 282.

3. See Bowstead, Art. 76, p. 192.

4. *Carrol v Tucker*, 2 N. Y. Misc. 397, *Smith v Sweeny*, 35 N. Y. 291, *Mayer v Dean*, 5 L. R. A. 540; *Roman v Brooklyn Life Ins. Co.* 7 Mo. App. 22.

5. *Story*, § 889, *McKenzie v. Nevius*, 38 Am. Dec. 291.

6. *Story on Agency*, § 371.

7. See Kassar, p. 504 citing *Chitty on Com. & Manf.*, Vol. II 551; *Pothentier v Dawson*, Holt's N. P. 388.

signed to a foreign merchant as security for an advance, albeit he may be factor entrusted with the sale of goods on commission when, by reason of the fall in the market or otherwise his security is declining in value and becoming insufficient, he is invested with the power of sale, over the goods after due notice to his principal, notwithstanding the fact that the latter places a limit on their sale, and desires to hold them on, if he does not put his factors in funds to make up the defect so caused.¹ But except in a few and limited cases of this sort, the right of the holder of the lien seems to be confined to a mere right of retainer, which may be used as a defence to any action for the recovery of the property brought against him, or as a matter of title or special property to reclaim the property by action, if he has been unlawfully dispossessed of it.²

How lien lost
or
extinguished.

The lien of an agent, being a mere right to retain possession of the property subject thereto, is, as a general rule, lost by his parting with the possession;³ and where goods, on which an agent had a lien, were delivered by him on board a ship, to be conveyed on account and at the risk of the principal, it was held that the agent had no power to revive the lien by stopping the goods in transit.⁴ But where possession is obtained from the agent by fraud⁵, or is obtained unlawfully and without his consent,⁶ his lien is not affected by the loss of possession. And if possession is given to a bailee for safe custody, or for some other purpose consistent with the continuance of the lien, and the circumstances are such as to show that the agent intends to retain his rights, the lien will not be prejudiced by his parting with the possession.⁷ Thus, where A, a solicitor, on the instructions of a mortgagor, prepares and engrosses a reconveyance, which he sends to the solicitor of the mortgagee with a request that he will hold it on A's account, he having a lien thereon, and the mortgagee executes the reconveyance, A's lien is not in the circumstances, prejudiced by his parting with the possession of the engrossment, nor by its being executed by the mortgagee as a deed.⁸ So, if an agent gives up a chattel in order that the principal may sell it and account for the proceeds to the agent he does not thereby lose his lien on the chattel.⁹

The lien of an agent is not affected by an order winding up the company whose agent he is. Therefore where the agent is in possession of property belonging to the company by virtue of his lien he cannot be required to deliver up possession to the official liquidator.¹⁰

An agent's lien is also extinguished by his entering into any agreement, or acting in any capacity, which is inconsistent

1. *Jafferbhoy v. Charlesworth* I. L. R. 17 Bom. 520.
2. *Kathar*, p. 505 citing *Chitty on Com. & Manf.*, Vol. II, p. 551.
3. *Krugel v. Wilcox* (1754). *Ambl.* 252; *Bligh v. Davies* (1860), 28 Beav. 211.
4. *Sweet v. Pym* (1800) 1 East 4; *Hathesing v. Laing* (1879), L. R. 17 Eq. 92.
5. *Wallace v. Woodgate* (1824) B. & M. 193.
6. *Dicas v. Stoeleg* (1836) 7 C. & P. 587; *In re Carter* (1886) 55 L. J. Ch. 290.
7. *North-Western Bank v. Poynter* (1895) A. C. 56; *Watson v. Lyon* (1855) 7 D. G. M. & G. 288.
8. *Watson v. Lyon* (1855). 7 D. G. M. & G. 288.
9. *North Western Bank v. Poynter*, (1895) A. C. 56.
10. *Chidambaram Chettiar v. Tinnevely Sugar Mills' Co.* (1908) 31 Mad. 123.

with the continuance of the lien.¹ Thus, where a shipmaster elects to allow the balance of his wages to retain in the hands of the managing owners at interest, he thereby surrenders his lien for such wages.² A solicitor acts for both mortgagor and mortgagee in carrying out a mortgage. The solicitor thereby loses his lien on the title deeds of the mortgaged property for costs due from the mortgagor, even if the costs were incurred prior to the mortgage, and the deeds are not permitted to be taken out of the solicitor's possession.³ Similarly, where a solicitor prepares a marriage settlement on the instructions of the intended husband, and retains it in his possession after the marriage he has no lien on the settlement as against the trustees, the costs of preparing it being payable by the husband.⁴

The lien of an agent is also extinguished or lost by waiver, express or implied. A waiver is implied whenever the conduct of the agent is such as to indicate an intention to abandon the lien, or is inconsistent with the continuance thereof. In particular, a waiver may be implied from his taking other security for the claim secured by the lien, if the nature of the security, or the circumstances in which it is taken, is or are inconsistent with the continuance of the lien, or is or are such as to indicate an intention to abandon it.⁵

An agent causes goods upon which he has a lien to be taken in execution at his own suit. He thereby waives the lien, though the goods are sold to lien under the execution, and are never removed from his premises.⁶ Similarly, where upon a demand being made against an agent by his principal for a chattel upon which the agent has a lien, the agent claims to retain the chattel on some other ground without mentioning the lien, he thereby waives the lien.⁷ A solicitor, having a lien for costs, takes a security for the costs, and does not tell the client that he intends to reserve the lien. He is deemed to waive the lien, it being the duty of a solicitor, if he intends to reserve his lien in such a case, to explain to the client that such is his intention.⁸

The lien of an agent is not affected by the circumstance that the remedy for recovery of the debt or claim secured thereby becomes barred by the Statutes of Limitation,⁹ or that the principal becomes bankrupt or insolvent,¹⁰ nor by any dealing

1. See Bowstead, Art. 77, p. 194, and the authorities cited therein.

2. *The Rainbow* (1885), 5 Asp. M. C. 479.

3. *Re Nicholson*, ex. p. *Quinn* (1883), 53 L. J. Ch. 302; *Re Mavon* (1878), 10 Ch. D. 729; *Re Snell* (1877), 6 Ch. D. 105; *Re Messenger* (1875), 3 Ch. D. 317, not followed.

4. *Re Lawrence*, *Banker v. Austin*, (1894) 1 Ch. 556.

5. See Bowstead Art. 77 pp. 194, 195 and the authorities cited therein.

6. *Jacobs v. Latour* (1828), 5 Bing. 130.

7. *Weeks v. Goode* (1859), 6 C. B. (N. S.) 367; *Boardman v. Sill* (1808), 1 Camp 410, n.

8. *Re Morris*, (1908) 1 K. B. 478; *Re Taylor* ex. p. *Payne Collier* (1891), 1 Ch. 590; *Bisell v. Bradford Tram. Co.* (1895) 9 T. L. R. 397, C. A.

9. *Spears v. Hartley* (1798) 3 Esp. 81; *Curwen v. Milburn* (1889) 42 Ch. D. 424.

10. *Robson v. Kemp* (1802) 4 Esp. 238; *The Cella* (1888) 13 P. D. 82; *Ex parte Reall* (1888) 24 Ch. D. 408.

by the principal with the property subject to the lien¹, after the lien has attached.

Goods were consigned to a factor for sale, and after he had sold them the principal committed an act of bankruptcy. The factor subsequently received the price of the goods. Held, that he had a lien on the goods for the amount of a debt due to him from the principal, and that he was entitled, as against the trustee in bankruptcy, to retain the proceeds in payment of the debt². So, an order for the winding-up of a company does not affect the lien of a solicitor upon documents of the company, if the lien was acquired before the presentation of the winding up petition³.

The principal assigns to a third person goods in the possession of a factor. The assignment does not affect the factor's general lien on the goods⁴. So, the lien of an agent upon a policy of insurance is effectual against a subsequent assignee of the policy who gives notice of the assignment to the insurer, though the agent has given no notice of his lien to the insurer⁵.

An agent's lien being founded on a contract, express or implied with the principal, it obviously follows that the lien, whether general or particular, of an agent attaches only on property in respect of which the principal has, as against third persons, the right to create a lien⁶ and, except in the case of money and negotiable securities, is confined to the rights of the principal in the property at the time when the lien attaches, and is subject to all rights and equities of third persons available against the principal at that time⁷. In the case of moneys or negotiable securities, an agent's lien is not affected by the rights or equities of third persons⁸, provided he receives them honestly, and has no notice of any defect in the title of the principal at the time when the lien attaches⁹. This does not depend on any principle of agency, but on the rule that any person who takes a negotiable instrument in good faith and for value acquires a good title notwithstanding any defect in the title of the person from whom he takes it; a person taking such an instrument under circumstances giving him a lien thereon being considered a holder for value to the extent of the lien¹⁰.

How far lien effective against third persons

1. *West of England Bank v. Batchelor* (1882) 51 L J Ch 199, *Godin v. London Assurance Co.* (1758) 1 W Bl 103
2. *Robson v. Kemp* (1802), 4 Exp 233
3. *Re Capital Fire Ins. Ass., ex p. Beall*, (1883), 24 Ch D 408, *Re Rapid Road Transit Co* (1909) 1 Ch. 96.
4. *Godin v. London Ass. Co* (1758) 1 W. Bl 103
5. *West of England Bank v. Batchelor* (1882) 51 L J Ch. 199.
6. *Ex parte Beall* (1883) 24 Ch D 408; *Cumiffe v. Blackburn Building Society* (1884) 9 App. Cas. 857.
7. *London & County Bank v. Ratchiffe* (1881) 6 App cas 722; *Turner v. Lette* (1255) 20 Beav. 185; 7 D. M. & G. 243, *Hollis v. Claridge*, (1813) 4 Taunt. 807; 89 R R 662, 663; *Fr. & v. Vizard* (1883) 5 B & Ad. 808, 89 R. R. 660; *In re Llewellyn* (1891) 3 Ch. 145
8. *Jones v. Peppercore* (1858) Johns 430, 123 R R. 177.
9. *Solomons v. Bank of England* (1810) 13 East, 135, *De la Chaumette v. Bank of England* (1829) 9 B & C. 208, *Ex Parte Kingston* (1871) 2 R. 6 Ch. 632.
10. *London & Joint Stock Bank v. Simmons* (1892) A. C. 201. *Misa v. Currie*, (1876) 1 App. cas. 554

72. Other rights of an agent arising from the duties of the principal.

Rights in respect of the goods bought by the agent in his own name.

Where an agent, by contracting personally, renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, rests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends it shall pass and the agent has the same rights with regard to the stopping them in *transitu* as he would have had if the relation between him and his principal had been that of seller and buyer.¹

Right to interplead.

Where adverse claims are made upon an agent in respect of any money, goods, or chattels in his possession, and he claims no interest in the subject matter of the dispute other than for costs or charges, he may claim relief by way of interpleader, even as against his own principal whose title he has acknowledged provided that he had no notice of the adverse claim at the time of such acknowledgment. Where the agent claims a lien on property as against the owner whoever he may be, the lien is not such an interest as deprives him of the right to interplead in respect of the ownership of the property; but where he claims a lien or any other interest in the property, or part thereof, other than for costs or charges, as against a particular claimant, he is not permitted to interplead.² So, where an agent has funds in his hands, upon which a third person claims to have been given a lien by the principal, the agent may interplead as against his principal and the third person.³ A instructs a stockbroker to sell shares, and sends him the sale certificate and blank transfers. The shares are claimed by B, who alleges that they were obtained from him by fraud. A sues the broker, claiming the return of the certificate and transfers. The broker may interplead.⁴ A partner of a vessel instructs a broker to insure it. The broker receives an amount due under the policy in respect of a loss which is claimed by the part owner and the broker is sued for the whole amount by the part owner who engaged him and for part thereof by the other part owners. The broker may interplead between them.⁵ A deposits goods with B a wharfinger, and afterwards requests him to transfer them to the name of C, reserving to himself a right to draw samples. B enters the goods in C's name. D then claims them as paramount owner, and A acquiesces in his claim. C also claims them. B may interplead as against C and D.⁶ Where A intrusted a policy to B for a specified purpose and C, who had pledged the policy with A, and A each brought an action against B for the policy, *held*,

¹. Rowstead, Art. 78, p. 197 and the authorities cited therein.

². Ibid, Art. 79, p. 198.

³. *Smith v. Hammond* (1883) 6 Sim 10.

⁴. *Robinson v. Jenkins* (1890), 6 T L R. 69, 158, C. A.

⁵. *Stuart v. Welch*, 4 M & C 805.

⁶. *Mason v. Hamilton* (1891), 5 Sim. 19; *Pearson v. Cardon* (1891), 2 Rump. & M 606, *Ex. p. Mersey Docks and Harbour Board*, (1899) 1 Q. B. 546.

that B was entitled to interplead.¹ Where an auctioneer who sells goods on behalf of a person and, whilst a portion of the proceeds is still in his hands, receives notice of a claim by another person, he is entitled to interplead as to the residue after the deduction of his expenses and other charges, if the principal sues him for the balance of the proceeds.²

It has been held under the English law that where the accounts between a principal and agent are of so complicated a nature that they cannot be satisfactorily disposed of in an action at law, the agent has a right to have an account taken in a court of equity.³ But a right to an account in the case of an agent is of a very limited nature and does not follow from the fact that the principal has also such right, because the right of the principal to an account from his agent is generally founded on the fiduciary character of the agency while the right of the agent has no such equitable basis.⁴ Where an agent is paid a salary or commission in proportion to the profits made on the business done, the question whether he is entitled to have an account taken depends upon whether or not the accounts are of too intricate or complicated a nature to be properly and conveniently gone into in the proceedings in an ordinary suit.⁵

Right to an account.

As already noted,⁶ an agent may retain out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.⁷

Agent's right of retainer out of sums received on principal's account.

It has been held under the English law that except in the case of insurance brokers, who may sue their principals for premiums due under policies effected by them even if they have not paid or settled with the underwriters, no agent has any right of action against his principal on any contract entered into on the principal's behalf, whether the agent is himself personally liable on the contract to the other contracting party or not.⁸ A, a foreign merchant, employs B to buy goods on commission. B buys the goods, and the vendors invoice them to him and take his acceptance for the price. B cannot sue A, as for goods sold and delivered.⁹ (His only remedy is an action for indemnity.)

No right to sue principal on contracts entered into on his behalf.

1 *Tanner v European Bank*, (1865), L R I Ex 261

2 *Beet v Hayes* (1862), 32 L J Ex 129, *Martinius v Holmuth* (1815), Coop 245, *Wright v Freeman*, (1879), 48 L J C P 276

3 *Bowstead*, Art 80, p 200.

4 *Jevaram Bhagwandas* (firm of) *v Ratanchand Fatehchand* (firm of) 78 I C 846 (Sind); *Gopal Kisan v Padamrai*, 37 I C 518 (Nag.)

5 *Ibid* See also *Bowstead*, Art, 80, p. 200

6 See notes on page 378

7 S. 217, Indian Contract Act, 1872.

8 *Bowstead*, Art. 81, p. 200.

9 *Seymour v. Psychian* (1817), 1 B & A. 14.

A broker buys goods on behalf of an undisclosed principal. He cannot sue the principal for not accepting the goods, although, having contracted without naming the principal, he is, by a custom of trade, personally liable on the contract.¹ Nor can he sue as for goods bargained and sold.²

1 *Tetley v Shand* (1872), 25 L T 658

2 *White v Benckendorff* (1878), 29 L T 475, *Ex p Dyster*, (1816), 2 Rose 349.

CHAPTER XI

RELATIONS BETWEEN THE PRINCIPAL AND THIRD PERSONS.

73. Enforcement and consequences of agent's contracts 74. Liability of the principal for wrongs of agent 75. Admissions by agents 76. Notice to the agent when and how far equivalent to notice to principal 77. Principal is not bound by acts of agent beyond scope of authority, or not done in course of employment 78. Agent acting as principal 79. Rights of principal in respect of property intrusted to an agent 80. Bribery of agent 81. Rights and liabilities of the principal on contracts made by agent 82. Other matters.

73. Enforcement and consequences of agent's contracts.

Contracts entered into through an agent, and obligations arising from acts done by agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

What acts of agents bind their principals.

ILLUSTRATIONS

- (a) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set off against that claim a debt due to himself from B.
- (b) A being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

(*S. 226, Indian Contract Act, 1872.*)

This general rule presupposes that the contract or act of the agent is one which, as between the principal and third persons, is binding on the principal. If the contract is entered into or act done professedly on behalf of the principal, and is within the scope of the actual authority of the agent, there is no difficulty. It is immaterial in such a case what may be the motive of the agent. The principal is bound though the contract may be entered into or act done fraudulently in furtherance of the agent's own interests, and contrary to the interests of the principal, provided the person dealing with the agent acts in good faith.¹ Bowstead² thus states the English law on the subject:

Acts within actual or apparent scope of authority.

"Every act done by an agent professedly on the principal's behalf, and within the scope of his actual authority, is binding on the principal with respect to persons dealing with the agent in good faith, even if the act be done fraudulently in fur-

1. *Hambro v Barnard* (1904) 2 K. B. 10, Where authority was given to underwrite policies of insurance in the name of the principal according to the ordinary course of business at Lloyd's, and the agent, in fraud of the principal, underwrote certain guarantee policies. In this case the authority was in writing, but there does not appear to be any distinction in the application of the principal between a written and a verbal authority. See also *Fazal Ilahi v East India Railway Co.*, A. I. R. 1923 All. 324= 64 I. C. 868.

2. Art. 82, p. 203.

insurance of the agent's own interests, and not in the interest of the principal.

Every act done by an agent in the course of his employment on behalf of the principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice that in doing such act he is exceeding his authority."

In cases falling under the general rule, it is the principal who can enforce rights and must discharge the obligations which arise from such act or contract. Where an agent is authorised to receive payment on behalf of the principal, a payment to the agent exonerates the debtor from liability to the principal and former can set up such payment in defence in a suit by the latter for the debt due to him. The fact that the agent embezzled or misappropriated the money paid to him and did not pay it to the principal is immaterial¹. Where money is paid to an agent authorised in that behalf, it is not necessary for the payer to prove that the money reached the principal¹. If the debtor does not set up such payment in defence against the principal's claim for the debt and the claim is decreed against him, he cannot afterwards sue the agent for a refund of it². One of the several debtors, however, cannot become the agent of the creditor for the realisation of the debt as he possesses an interest adverse to the creditor. A payment, therefore, to one of the debtors by other co-debtors does not exonerate the latter from their liability to the creditor³.

The rule is thus summed up in Halsbury's Laws of England⁴:

Express authority.

"Where a principal gives an agent express authority to do a particular act or class of acts on his behalf, or leads an agent reasonably to believe that he is clothed with that authority, the principal is bound, as regards third persons, by every act done by the agent which is so authorised, or which is necessary for the proper execution of such authority, even though the existence of such authority is unknown to the third person.

General authority.

Where a principal gives an agent general authority to conduct any business on his behalf, he is bound, as regards third persons, by every act done by the agent which is incidental to the ordinary course of such business, or which falls within the apparent scope of the agent's authority.

Authority by estoppel.

Where a person has by words or conduct held out another person, or enabled another person to hold himself out, as having authority to act on his behalf, he is bound, as regards third parties, by the acts of such other person to the same extent as he would have been bound if such other person had in fact had the authority which he was held out as having; but where in a series of transactions between an agent and a third party, the agent has exceeded his

1. *Bibi Batul v. Kedar Nath*, A. I. R. 1925 Oudh 462.

2. *Kulandaiselvi Pillai v. Ramaswami Nacker*, A. I. R. 1923 Mad. 551.

3. *Shree Aung v. Arunachellam*, 11 L. O. 864.

4. 2nd Edn. Vol. I, Arts. 497 to 449, p. 369.

authority mere failure by the principal to detect the irregularity, even though the failure be negligent, does not create an authority by estoppel".

An agent was given authority, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business. A third person, in good faith and without notice that the agent was exceeding his authority, lent money to him on such exceptional terms. Held, that the principal was bound, although in the particular case the emergency had not arisen¹.

A solicitor is authorised to sue for a debt. A tender of the debt to his managing clerk operates as a tender to the client, even if the clerk was instructed not to receive payment of the particular debt, unless at the time of the tender he disclaims any authority to receive the money².

A broker was permitted by his principal on several occasions to draw bills in his own name for the price of goods sold on the principal's behalf. A purchaser accepted a bill so drawn, having previously paid in a similar manner for goods supplied to him. Held, that the principal was bound by the payment, although the broker became bankrupt before the maturity of the bill³.

An agent was intrusted by his principal with a document containing a written consent signed by the principal to do a particular act, but the agent was told not to give the consent, except on certain conditions which were not specified in the document. The agent consented unconditionally. Held, that the principal was bound, though he had signed the document without having read it⁴. So, where A gave B a power of attorney to charge and transfer in any form whatever any estate, etc., following A's letters of instructions and private advices which, if necessary, "should be considered part of these presents," it was held that A was bound by a mortgage on his property executed by B, although as between A and B the mortgage was not authorised⁵. So, where a principal wrote "I have authorised A to see you, and, if possible, to come to some amicable arrangement"—and gave A private instructions not to settle for less than a certain amount, it was held that he was bound by A's settlement for less than that amount, the instructions not having been communicated to the other party⁶. No private instructions given to an agent, of which the persons dealing with him have no notice, prevent the acts of the agent, within the scope of his ostensible authority, from binding the principal⁷.

- 1 *Montaigne v Shitta* (1890) 15 App cas 357 See also *Bryant v Quebec Bank*, (1893) A C 179
- 2 *Moffatt v Parsons* (1814) 1 Marsh 55
- 3 *Townsend v Inglis* (1816) Holt 278, *Meyer v See Hai Tong Banking etc. Co.*, (1913) A. C 847
- 4 *Beaufort v Neelt* (1845), 12 C & F 248, H L
- 5 *Davy v Waller* (1890), 81 L T 107
- 6 *Trickett v Tomlinson* (1863) 13 C B (N. S.) 663
- 7 *National Bolivian Navigation Co v Wilson* (1880), 5 App Cas 176 209, H. L.

A claims £ 50 from B for the use and occupation of certain premises, and authorises to pay the amount to C. B calls on C and expresses his readiness to pay the amount, but C refuses to accept it, and claims a larger sum. There is a concluded agreement between A and B to settle the claim for £ 50, and A cannot maintain an action for a larger sum.¹

An auctioneer is instructed to sell a pony by auction, a reserve price being fixed. By mistake he sells it, without reserve. The principal is bound by the sale, subject to the provisions of the (English) Sale of Goods Act, 1893,² unless the conditions of sale expressly provide that the lot is offered subject to a reserve price.³

The manager of a business, which he carried on in his own name as apparent principal, ordered goods for the business. Held, that the undisclosed principal was liable for the price of the goods, although in ordering them the manager had exceeded his actual authority⁴.

A gives B a signed form of promissory note or acceptance in blank, with authority on certain conditions to fill it up and convert it into a bill of exchange or promissory note for a certain amount. B fills it up in breach of the conditions and for a larger amount than was authorised, and negotiates it to C, who takes it in good faith and for value, without notice of the circumstances. A is liable to C on the bill or note as filled up⁵. Otherwise, if C had notice of the circumstances under which the document was issued⁶, or if B had not been authorised to fill up or negotiate the instrument except on the receipt of instructions from A in that behalf.

A resident agent and manager of an unincorporated mining company orders goods which are necessary for working the mine. The shareholders are liable for the price, though the regulations of the company provide that all goods shall be purchased for cash, and no debt shall be incurred; unless the person supplying the goods had notice that the agent was exceeding his authority⁷.

An agent was employed as manager of a business, which he carried on apparently as principal. It was incidental to the ordinary course of the business to draw and accept bills of exchange, but it had been expressly agreed between the principal and agent that the agent should not draw or accept bills of exchange, on the principal's behalf. The agent accepted a bill, in the name in which the business was carried on. Held, that the principal was liable on the bill⁸. So, a horsedealet is bound by

1. *Gretton v. Mees* (1878), 7 Ch. D. 839, *Field v. Boland* (1837), 1 Dr. & Wal. 37.

2. *Rainbow v. Hawkins*, (1904) 2 K. B. 322.

3. *Mc Manus v. Fortescue*, (1907) 2 K. R. I.

4. *Walleau v. Fenwick* (1898) 1 Q. B. 346. But see *Kinahan v. Parry*, (1911) 1 K. B. 459.

5. *Lloyd's Bank v. Cook* (1907) 1 K. B. 794.

6. *Haich v. Searles* (1854), 24 L. J. Ch. 22.

7. *Hawken v. Bourne* (1841), 8 M. & W. 703.

8. *Edmunds v. Bushell* (1865), L. R. 1, Q. B. 97.

a warranty given by his agent for the sale of a horse,¹ and a client by a compromise entered into by his solicitor,² even if the warranty or compromise were contrary to express instructions, with respect to persons having no notice of such instructions.

A was in debt to a company for goods supplied by its branch at X, and also for goods supplied by its branch at Y. He entered into a deed of assignment for the benefit of his creditors. The company's agent at X branch assented to the deed, but its agent at Y branch refused to assent. The company sued A for the debit incurred at Y branch. Held, that the company was bound by the assent given by its agent at X branch as to all debts due from A, and was precluded from maintaining the action.³

The directors of a company borrow money within the limits of their borrowing powers. The lender is under no obligation to inquire for what purposes the money is borrowed, and the company is bound by the loan, though it was borrowed and is applied for purposes which are *ultra vires*, unless the lender had notice, of the improper nature of the transaction.⁴ If, by the articles of association authority to borrow be restricted to the directors, the company can only be made liable for loans raised by the directors acting within their actual or apparent authority;⁵ but where the articles of a trading company empower the directors to borrow without restricting such power to the directors, the company may exercise its borrowing power through other duly authorised agents, and the acts of such agents, within the scope of their actual or apparent authority, will bind the company.⁶

The directors of a company, having power to borrow such sums of money on the company's behalf as are authorised by resolution in general meeting borrow £ 1,000 upon a bond under the seal of the company without the requisite resolution having been passed. The company is liable on the bond, unless the lender had notice of the irregularity.⁷ Persons dealing with a limited company are deemed to have notice of the contents of its memorandum and articles of association;⁸ but where an act is done by directors within the scope of their powers, third persons are entitled to assume that all the necessary formalities and conditions have been duly complied with unless they have notice of any irregularity.⁹ So, where the directors of a company had authority to delegate such of their powers as they thought fit to a managing director, it was held that the company was bound by the acts, within the scope of such powers, of a person who acted to their knowledge as managing director, though there

1. *Howard v Sheward* (1866), L.R. 2 C. P. 148

2. *Butler v. Knight* (1867), L.R. 2 Ex. 109, *Smith v. Troup* (1849), 7 C.B. 757.

3. *Dunlop Rubber Co. v. Haigh*, (1937) 1 K.B. 347

4. *Re Payne Young v. Payne*, (1904) 2 Ch. 608.

5. *Mahony v. East Holyford Mining Co* (1875), L.R. 7 H.L. 869

6. *Mercantile Bank of India v. Chartered Bank of India*, (1937) 1 A.11 E.R. 231.

7. *Royal British Bank v. Turquand* (1856), 6 E. & B. 327.

8. *Gloucester Bank v. Rudry, etc. Colly Co.*, (1895) 1 Ch. 629; *Duck v. Tower etc. Co.* (1901) 2 K.B. 814; *Montreal etc. Co. v. Robert*, (1906) A.C. 196; *Dey v. Pullinger etc. Co.*, (1921) 1 K.B. 77.

was no other evidence that he had been duly appointed, or that the powers of the directors had been delegated to him, the person dealing with him having acted in good faith and without notice of any want of authority.¹

A, an iron dealer, on one occasion sent B, a waterman, to buy iron on credit from C, and in due course paid C for it. On a subsequent occasion he sent him with ready money, but B again bought on credit and misappropriated the money. Held, that A was liable to C for the price of the iron bought on the second occasion, B apparently having authority to pledge his credit.²

The assignee of a life policy which was voidable if the assured went beyond Europe, in paying the premiums to the local agent of the assurance company, told him that the assured was in Canada. The agent said that that would not avoid the policy, and continued to receive the premiums until the death of the assured. Held, that the company was estopped by the representation of its agent from saying that the policy was avoided by the absence of the assured.³ So, where a shipmaster signed a bill of lading containing a statement that the freight had been paid, it was held that the owners were estopped from claiming the freight from an indorsee for value of the bill of lading.⁴

Fraudulent
motive of
agent imma-
terial.

A principal is not exempt from liability, where he would otherwise be bound by an act done by his agent, by reason of the fact that the agent in doing it was acting in fraud of the principal, or otherwise to his detriment.⁵ Similarly, a third party dealing in good faith with an agent acting within the apparent scope of his authority, and purporting to act as agent, is not prejudiced by the fact that as between the principal and his agent, the agent is using his authority for his own benefit and not for that of his principal.⁶

The onus of proving good faith, however, lies on such party claiming against the principal.⁷ If the agent, however, was acting in collusion with the third party without the principal's consent and the transaction is detrimental to the interests of the principal the latter is not bound by it.⁸ Where an agent fraudulently, in furtherance of his own interests and contrary to instructions enters into a contract, the principal will be bound only if third persons dealing with the agent have acted in good faith.⁹ The older cases which made the principal's liability for the fraud of the agent conditional upon the fact that fraudulent act was

1 *Riggstaff v Rowatt's Wharf* (1896) 2 Ch 93, *British Thomson Houston Co v Federated European Bank*, (1932) 2 K B. 176.

2 *Hazard v. Treadwell* (1780) 1 Str 506 Comp. *Barrett v. Irvine*, (1907) 2 Ll R. 462 C. A.

3 *Wing v Hurvey* (1851), 23 L J. Ch. 571; *Refuge Ass. Co v Kettlewell*, (1909) A C. 243.

4 *Howard v Tucker* (1831), 1 B. & Ad 712 See also *Compania Naviera Vasconzada v. Churchill*, (1906) 1 K B 237.

5 *Halsbury*, Vol. I, 2nd Edn, Art 450, p. 270. See also *Hulam Chand v Bengal Nagpur Ry*, 45 IC 856, *Sherjan Khan v Alimoodds*, 20 C W.N. 268, *Tahuk Board v Birde* 1 L R. 31 Mad. 54.

6 *Ibid.*

7 *Bhagwanji v Ganga*, 36 IC 968

8 *Sherjan v. Alimoodi*, 49 Cal 511; *Bhagwanji v. Ganga*, *supra*.

done in furtherance of the principal's interests¹ and held, that the principal was not liable where the agent's fraudulent act was done by him in furtherance of his own interests,² do not appear to be good law now.³ The rule laid down in England in *Barwick v. English Joint Stock Bank*⁴ on which the view taken by the Calcutta High Court and by the older cases in other High Courts in India, was based, has been considered and explained by Lord Macnaughten in *Lloyd v. Grace Smith*⁵ thus: "I agree with my noble and learned friend Lord Halsbury that the case of *Barwick v. English Joint Stock Bank*⁶ has been misunderstood in late years; I think it follows from the decision and the ground on which it is based that, in the opinion of the court, a principal must be liable for the fraud of his agent committed in the course of the agent's employment, and not beyond the scope of his agency whether the fraud be committed for the principal's benefit or not."⁷

A, a solicitor being intrusted with £4,000 to be lent on a mortgage, fraudulently retained £500, and told the mortgagor's solicitor that he was retaining it until a question as to the title was settled. A having become bankrupt, it was held that the mortgagor was entitled to redeem the property on payment of £3,500, with interest, though the mortgage deed acknowledged the receipt of £4,000; the retention of the £500 being within the apparent scope of A's authority.⁸

A is authorised in writing to act as the agent of B for the purpose of underwriting policies of insurance, and carrying on the ordinary business of underwriting, at Lloyd's, in the name and on behalf of B, in accordance with the usual custom of Lloyd's. A, in his own interests, and in abuse of his authority, underwrites a guarantee policy in B's name, the assured acting in good faith, but having no knowledge of the existence of the written authority or of its terms. It is the ordinary course of business at Lloyd's to underwrite such policies, and A was therefore at Lloyd's to underwrite such policies, and A was therefore acting within the scope of his actual authority, though in fraud of B. B is bound by the policy, A's motive in executing it being immaterial.⁹

A gave B a power of attorney authorising him to draw cheques on B's banking account and apply the money for A's purposes. B fraudulently drew cheques on A's account signing the cheques "A by B his attorney", and paid the cheques into his own banking account to meet an overdraft. B's bankers applied the cheques in reduction of the overdraft without making enquiries as to B's authority. Held, that B's bankers were

¹ *Gopal Chander Bhattacharya v. Secy of State* 36 Cal 647; *Mc Laren Morrison v. Verschoyle*, 6 C W N 429, *Ishua v. Chandu Santra Bagdi v. Sushil Chandra Gtra*, 30 Cal 207

² *Jauahar Lal v. Poikiamam* 6 W R 252

³ *Shehryar Khan v. Alimuddin* 43 Cal 511, *Vardhman v. Radhakrishnan*, A I R 1924 Nag. 79, See Katar, p 618

⁴ L R 2 Exch 259

⁵ 1912 A C 716

⁶ See also *Dina Bandhu Shah v. Abdul Latif*, 27 C W N. 18

⁷ *Boyd v. Craster* (1864), 10 L T. 480

⁸ *Humbro v. Burnand*, (1904) 2 K B 10

bound by the terms of B's legal authority, which did not extend to paying B's debts with A's money¹; that they had converted the cheques; and as, from the form of the cheques, they had notice that the money was not B's money, they were negligent in not making enquiry as to B's authority and therefore could not avail themselves of the protection of the (English) Bills of Exchange Act, 1882², S. 82, and were liable to A for the amount of the cheques³.

74. Liability of the principal for wrongs of agent

Torts committed by the agent.

Where injury or loss is caused to third person by the wrongful act or omission of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent.⁴

An agent acts within the scope of his authority when he acts by authority of his principal or otherwise in the course of his employment.⁴

Where the agent is acting in the course of his employment, the principal is liable although the agent, as between himself and the principal, has no authority to do the particular act and the act is done for the benefit of the agent and not of the principal.⁴

Where an agent while acting in the ordinary course of his employment on the principal's behalf, infringes a patent or a trade mark the principal is liable for the infringement⁵. Where a bailiff wrongfully distrains chattles after having improperly refused a tender of the rent and expenses, the landlord for whom he is acting is liable for the wrongful distress⁶. So also the landlord is liable for the wrongful distress by the bailiff, if the latter continues the distress after a tender of the rent and expenses to the former⁷. But he is liable for an unauthorised assault committed by the bailiff in levying a distress⁸. Where a factor makes representations, as to the quality of the goods sold on his principal's behalf the principal is liable in action for deceit, even if he did not authorise the factor to make the representations, to the same extent as if he had made them himself⁹.

A, being hired to sing at a music-hall and being permitted to choose his own song, sang a song infringing B's copyright. No control was exercised by the proprietor of the music-hall to prevent infringement of copy-right. Held, that there was sufficient evidence for the jury of authority to sing the song complained of to render the proprietor liable in an action by B

1. *Midland Bank v. Reckitt*, (1939) A. C. 1; *Reckitt v. Barnett*, (1929) A. C. 176.
2. 45 & 46 Vict. C. 61.
3. *Midland Bank v. Reckitt*, *supra*.
4. See Bowstead, Art. 102, p. 249.
5. *Betts v. De Vitre*, L. R. 3 Ch. 429; *Tonge v. Ward*, 21 L. T. 480.
6. *Haich v. Hale*, 19 L. J. Q. B. 289; *Hurry v. Richman*, 1 M. & R. 126; *Gauntlett v. King*, 3 C. B. N. S. 59; *Freeman v. Rosher* 18 L. J. Q. R. 341.
7. *Smith v. Goodwin*, 2 L.J.K. B. 192.
8. *Richards v. Went Middlessex Waterworks Co.* (1885), 15 Q. B. D. 660; *Radley v. L. C. C.* (1913), 109 L. T. 162.
9. *Horn v. Nichols*, 1 Salk. 289.

for the infringement.¹ So, where the Chairman of a meeting at the request of another person present in the meeting made a defamatory statement concerning a third person and both of them expressed a desire that the reporters present should take notice and consequently, a correct report was published, it was held in an action by the person defamed for libel that there was evidence of publication, by the Chairman as well as by the person present at whose instance the statement was made, through the reporters whom they constituted their agents.²

A the owner of a motor car, while riding in the car with B, allows B to drive. B causes injury by negligent driving. Unless it can be shown that A has abandoned control, he is liable for the injury.³ So, where A, the owner, permitted B to drive when A's driver was riding in the car with B.⁴ So, where the owner permitted another to drive the car, without abandoning the right of control, although neither the owner nor his servant was in the car.⁵ Otherwise, where the right of control is abandoned.⁶ A the landlord of a shop, which was let to B, entered the shop with C, whom he invited to assist in reaching for an escape of gas. C negligently caused an explosion, which damaged the goods of B on the premises. Held, that A was responsible for the negligence of C, his agent.⁷

Where a master ordered his servant to lay rubbish near a neighbour's wall with an instruction that it should not touch the wall but the rubbish reached the wall, it was held that the master was liable for the trespass.⁸ Otherwise, if the servant lay the rubbish in a place which the master has forbidden.⁹ So, where an inspector of a railway company in exercise of his power to arrest passengers committing fraud on the revenues of the company by travelling without ticket or otherwise, by mistake, arrested a person under a false charge of refusing to give up his ticket or pay his fare, it was held that the company was liable for false imprisonment.¹⁰ So, where a porter of a railway company, whose duty was, so far as possible, to prevent passengers from going in wrong trains, but not to remove them from carriages, violently pulled a passenger out of the railway carriage in the erroneous belief that he was in the wrong train, and the passenger was injured, it was held that the company was liable, in as much as the porter simply did in an improper manner what he was employed to do.¹¹ Similarly, where a train conductor negligently and brutally pushed a passenger off the train because he

1. *Monaghan v. Tynlor* (1886), 2 T. L. R. 685.

2. *Parker v. Prescott* (1869), L. R. 4 Ex. 169.

3. *Samson v. Atchison* (1912) A. C. 844, *Pratt v. Patrick* (1924) 1 K. B. 488.

4. *Reichardt v. Shard* (1914), 81 T. L. R. 24, C. A.

5. *Parker v. Miller* (1926), 42 T. L. R. 408, C. A.

6. *Britt v. Galmoye* (1928), 44 T. L. R. 294.

7. *Brooks v. Bool* (1928) 2 K. B. 578.

8. *Gregory v. Piper* (1829), 9 B. & C. 591; *Goh Choon Seng v. Neo Kim Soo* (1925) A. C. 550.

9. *Hand (or Bank) v. Craig* (1919) 1 Ch. 1.

10. *Moore v. Metropolitan Rail. Co.*, L. R. 8 Q. B. 86; *Goff v. G. N. Rail.* 80 L. J. Q. B. 148. As to arrest by a special police constable employed by a railway company, see *Lambert v. G. E. Rail. Co.* (1909) 2 K. B. 776.

11. *Bayley v. M. S. & L. Rail.*, L. R. 8 C. P. 148; *Lowe v. G. N. Rail.*, 62 L. J. Q. B. 524.

refused to pay him the fare, the company was held liable for the assault, and injury.¹ So also where a train conductor dragged from train carelessly and with unnecessary violence a passenger who had misconducted himself and threw him on the ground the employer was liable for the injury.²

A principal is liable for infringement by his agent, acting in the course of his employment, of a patent,³ trade mark,⁴ or copyright.⁵ Similarly, where a solicitor, by indorsement upon a writ of execution, directs the sheriff to seize the goods of the wrong party, the client is liable, it being the solicitor's duty to indorse the writ.⁶ So, if the solicitor issue execution after the debt has been paid.⁷ But a solicitor has no implied authority to direct the sheriff to seize particular chattels.⁸

Where a clerk, without the authority of his master, used his master's lavatory and negligently left the tap running, it was held that the master was not responsible for the damage done.⁹ Otherwise, if the clerk had permission to use the lavatory.¹⁰ Where a carman left a coal-shoot open in the highway, his master was held liable for injury resulting therefrom.¹¹

A sent a barge under the management of his lighterman to be loaded at a wharf. The foreman at the wharf directed the lighterman to move another barge out of his way, and the lighterman did so, causing damage to such another barge. Held, that A was liable to make good the damage.¹² Similarly, where a harbour-master permitted the master of a ship to use a certain dock, representing that the dock was level and that the ship might safely ground there, other vessels having on previous occasions being grounded in the same dock under similar circumstances, the ship, however, being damaged by a sill projecting above the level across the middle of the dock, it was held that the owners of the dock were liable as the harbour master who was acting within the scope of the authority in giving permission to use the dock and in representing that the ship might safely ground.¹³ In *Tronson v. Dent*,¹⁴ certain opium forming part of a ship's cargo, was damaged in the course of the

1. *Smith v. North Met. Tram. Co.*, 55 J.P. 630 C.A. See also *East Counties Rail Co. v. Broom*, 20 L.J. Ex 196; *Whittaker v. L.C.C.*, (1915) 2 K.B. 676, *Hutchins v. L.C.C.* 85 L.J.K.B. 1177. The conviction of the agent for the assault does not affect the liability of the principal. See *Dyer v. Munday* (1895) 1 K.B. 142.
2. *Seymour v. Greenwood*; *Greenwood v. Seymour*, 30 L.J. Ex. 327.
3. *Betts v. De Vitre* (1868), L.R. 3 Ch. 429.
4. *Tonge v. Ward* (1869), 21 L.T. 480.
5. *Monaghan v. Taylor* (1886), 2 T.L.R. 685.
6. *Jarmain v. Fisher* (1848), 1 D. & L. 169, *Morris v. Sulbey* (1889), 22 Q.B.D. 614, C.A.
7. *Bates v. Pilling* (1826), 6 B. & C. 38, *Clissold v. Cratchley*, (1910) 2 K.B. 244.
8. *Smith v. Keal* (1882), 9 Q.B.D.
9. *Stevens v. Woodward* (1881), 6 Q.B.D. 318.
10. *Ruddiman v. Smith* (1889), 60 L.T. 708.
11. *Whiteley v. Pepper* (1876), 2 Q.B.D. 276; *Daniel v. Rickett*, (1888) 2 All. E.R. 681.
12. *Page v. Defries*, (1866), 7 B. & S. 137; over-ruling *Lamb v. Palk* (1840), 9 C. & P. 629.
13. *The Apollo* (1891) A.C. 499; *East London Harbour Board v. Caledonia Shipping Co.*, (1908) A.C. 971; *The Bien* (1910), 27 T.L.R. 9.
14. (1853), 8 Moo. P.C. 413, P.C.

voyage, and was sold by the master. Held, that there being no necessity for the sale, the shipowners were liable to the consignee for the value of the opium. An unnecessary sale by a shipmaster of any part of the cargo is a conversion for which the shipowners are liable.¹

In *Abraham v. Bullock*,² a jeweller hired from a jobmaster a broughman with horse and driver, for the use of a traveller who visited customers with a stock of jewels. The driver in the temporary absence of the traveller left the carriage unattended and a thief drove it away and stole the jewels. Held, that it was the duty of the jobmaster to supply a driver whose business it should be to act in the usual way as regards taking care of the carriage in the occasional and temporary absence of the traveller, and that the jobmaster was liable for the loss.

A silversmith hired from a jobmaster a brougham and driver for the use of a traveller, it being understood that the traveller would carry valuable samples and that it would be the duty of the driver to take care of the contents of the brougham during the necessary absence of the traveller. The driver, who was reasonably supposed by the jobmaster to be trustworthy, stole the contents of the brougham during the necessary absence of the traveller. Held, that the jobmaster was not liable for the loss as the theft was a crime committed by a person who in committing it severed his connection with his master and became a stranger³.

In *Aitchison v. Page, Motors Ltd*⁴, A sent a car for repair to B's garage. B, by arrangement with A, sent the car to C's works for the repairs to be done. When the repairs were completed, B's manager, who had authority on behalf of B to take delivery of the car from C, drove the car from C's works; but, instead of driving it to B's garage, as was his duty, he used it for a journey of his own, in the course of which it was damaged as the result of his negligent driving. Held, that B was responsible for the manner in which his manager had conducted himself in performing the service of fetching A's car from C's works. Similarly, where a motor car was deposited at A's garage for safe custody and the night watchman at the garage, who was A's servant, took the car out for his own purposes and caused damage to it by negligent driving, it was held that A was liable for the damage⁵. The acts of the night watchman were an ill way of executing the work that had been assigned to him⁶. In *Jefferson v. Derbyshire Farmers, Ltd*⁷, A, the owner of a garage, leased it to persons who agreed to garage B's lorries there. A servant of B, while drawing motor spirit from a drum into a tin (which was an act within the scope of his employment) threw a lighted match on the floor. The match set fire to some petrol which was on the floor; the fire spread to the motor spirit,

1 *Ewbank v. Nutting* (1849), 7 C.B. 797.

2 (1902), 86 L. T. 796, C.A.

3 *Chester v. Bailey*, (1905) 1 K.B. 337.

4 (1936), 154 L. T. 128.

5 *Central Motors (Glasgow), Ltd. v. Clessnock Garage etc Co* (1925) 80 796

6 (1921) 2 K. B. 281.

and the garage was burned down. Held, that B was liable for the negligence of his servant in the course of his employment. Where A lent his shed to B to make therein a sign-board, and C, a carpenter employed by B, whilst at work in the shed making the sign-board, lighted his pipe from a shaving which he dropped and thereby set fire to shavings on the ground, it was held that B was not liable for C's negligence, because the act of lighting his pipe was not done in the course of C's employment¹.

An omnibus driver, in order to prevent a rival omnibus from overtaking him, drove his omnibus across the road and caused the rival omnibus to overturn. The driver had instructions from his employers not to race with or obstruct other omnibuses. Held, that the employers were liable, the wrongful act being done in the course of the driver's employment². It is not within the ordinary course of employment of the conductor of an omnibus to drive; and his employers are not liable for injuries caused by his negligent driving³. But it is the duty of the driver of an omnibus to prevent another person from driving, or, if he allow another person to drive to see that he drives properly; and where in breach of this duty, the driver allows the conductor to drive, and damage results from the negligent driving of the conductor, the employers are liable, if the effective cause of the damage is the breach of duty by the driver⁴.

Where a servant, in driving his master's vehicle for his own purposes negligently injures a third party, the liability of the master depends upon whether the servant is following his employment or has so far abandoned it that he is not acting on behalf of his master⁵.

A barman gave a person into custody for attempting to pass bad money, the bad money having been returned and good money paid. Held, that the employer was not liable⁶. So, where a booking clerk gave a person into custody for attempting to steal from the till, after the attempt had ceased, the railway company was held not liable⁷. The liability of a principal for false imprisonment in such cases depends upon whether it is within the ordinary course of the agent's employment to arrest persons or give them into custody on behalf of the principal, and the general rule is that an agent or servant has implied authority to do so only when such a course is necessary for the protection of his principal's or master's property⁸. Where a servant reasonably believes that his master's property is being stolen, he has implied authority, in an emergency, to take reasonable steps to protect it; and if, with this object, he commit an

1. *Williams v Jones* (1865), 3 H & C 602.

2. *Lampus v London General Omnibus Co* (1862), 32 L J Ex. 34; *Baker v Snell*, (1908) 2 K.B. 925.

3. *Beard v. L. G. & Co.* (1900) 2 Q.B. 530.

4. *Bicketts v. Tilling*, (1915) 1 K.B. 644.

5. *Joel v. Morison* (1834), 6 C & P. 501; *Sanderson v. Collins*, (1904), 1 K.B. 628.

6. *Abrahams v. Deakin* (1891) 1 Q. B. 516.

7. *Allen v. L. & S. W. Ry* (1870) L.R. 6 Q.B. 65.

8. *Edwards v. L. & N. W. Ry* (1870), 4 App. Cas. 270; *Hanson v. Waller*, (1901) 1 K.B. 390.

assault, the master will be responsible, unless the servant use such excess of violence that his act is not within the class of acts which he is impliedly authorised to do¹.

Where an agent, acting on behalf of a vendor, makes fraudulent misrepresentations which induce the sale, the principal is liable in an action for deceit, although he did not authorise the agent to make the misrepresentations². So a local authority is liable to contractor for fraudulent misrepresentation, made by their agent, as to the nature of the work to be done under the contract³. A clause in a contract by which the principal disclaims responsibility for the accuracy of statements made by his agent does not exempt the principal from liability for the agent's fraudulent misrepresentations³.

In *Lloyd v. Grace, Smith & Co.*⁴, a solicitor managing clerk, who had a general authority to conduct the conveyancing business of his principal, induced a widow to give him instructions to realise certain properties with a view to the re-investment of the proceeds. For that purpose she handed him her title deeds, for which he gave her a receipt in his principal's name; and, at his request, she signed two documents, which were not read over or explained to her, and which she thought were necessary for the realisation of the properties. The documents were in fact conveyances of the properties to himself; and he afterwards disposed of the properties for his own benefit. Held, that the principal was liable for the fraud.

If an agent, having control of his principal's business, fraudulently prefers a particular creditor, that is a fraudulent preference by the principal⁵.

It is no defence to an action against a principal for a tort committed by his agent that the act complained of amounted to a felony on the part of the agent, if the act is otherwise within the scope of his authority⁶, nor the fact that the act was expressly forbidden in any way, affects the liability of the principal⁷. The doctrine that a person injured by a felonious act cannot seek civil redress without prosecuting the felon does not apply where the principal is sued in respect of the wrongful acts of his agent⁸.

The principal is liable civilly to third persons for frauds, deceptions, concealments, misrepresentations, torts, negligence and other malfeasances, or misfeasances and omissions of duty of his agent in the course of his employment although the principal did not authorise or participate in or, indeed know of such misconduct or even if he forbade the acts⁹. In *Sekunder v. Nocerri*¹⁰, plaintiffs and defendants carried on business in the same

1. *Poland v. Parr*, (1927) 1 K B 296
2. *Herr v. Nichols*, (1701), 1 Salk 289, *Hilo Manufacturing Co. v. Williamson* (1911), 28 T.L.R. 164, C.A.
3. *Pearson v. Dublin Corporation*, (1907) A.C. 951
4. (1912) A.C. 716.
5. *Re Drabble*, (1930) 2 Ch. 211.
6. *Osborne v. Gillet*, L.R. 8 Exch. 88; *Taluk Board v. Burde*, 31 Mad. 51
7. *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Sherjyn v. 'Alimuddi*, 43 Cal. 511.
8. *Taluk Board v. Burde*, 31 Mad. 51.
9. *Sherjyn v. Alimuddi*, 43 Cal. 511,
10. 11 C.L.R. 547.

place and when a member of either firm took advantage of the opportunity to get the same person to purchase goods on their behalf. A member of defendant's firm, who was sent to Calcutta, through his own negligence lost a sum of money given by plaintiffs to defendants for purchase of goods. The court held that the defendant's firm and not only the particular member by whose negligence the money was lost, was responsible.

Act done during course of employment.

As already observed, an agent acts within the scope of his authority when he acts by authority of his principal or, otherwise in the course of his employment. What is meant by the term 'course of employment' is largely a question of fact. An agent is acting within the course of his employment when he is engaged in doing for his principal either the act consciously and specifically directed or any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act or a natural direct and logical result of it'. It is not merely a question of time or place. Every act which an agent or servant may do while he is in the place appointed for the service, or during the time in which he is engaged in the performance, cannot be deemed to be 'within the course of the employment' or 'within the scope of the authority'. The test lies deeper than that; it inheres in the relation which the act done bears to the employment. No act can be deemed to be within the course of the employment, unless, before looking at it, it can fairly be said to be a natural, not disconnected and not extraordinary part or incident of the service contemplated¹. Thus, a servant, who, while driving his master's team upon the master's business amuses himself by striking people, within reach, with the whip which he holds in the other hand, does so while he is acting generally for his master and while he is in the place in which his service requires him to be, but his act in striking people with the whip is not within the course of his employment, and his master is not liable². While if he strikes people to clear his way through, the act though unauthorised and improper and even against the wishes of the master or against his instructions or expressly forbidden by him, is in the course of his employment as it is done in furtherance of and incidental to the service in which he is employed³. Where the manager of sewage farm, in order to improve the drainage scoured a brook separating a third person's land from the farm, pared down the bank of such land and cut down some bushes therein it was held that the farm owners were not liable for the trespass, which they had not authorised, because it was outside the scope of the manager's employment to do any act outside the farm⁴.

Law in India—effect, on agreement of misrepresentation or fraud by agent.

Section 238 of the Indian Contract Act, 1872, prescribes as follows:

1. Mechem, §. 1879.
2. See Katar, p. 625. See also the cases cited above.
3. Mechem, §. 1880.
4. Mechem, §. 1881.
5. *Dolnbrooke v. Swindon*, L. R. 9 C. P. 505.

"Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed by agents, in matters which do not fall within their authority, do not affect their principals.

ILLUSTRATIONS

- (a) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorised by B to make. The contract is voidable as between B and C at the option of C.
- (b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

The law on the subject was thus explained by Lord Lindley in a judgment delivered in the Privy Council: "The law upon this subject cannot be better expressed than it was by the acting Chief Justice (of New South Wales) in this case. He said: 'Although the particular act which gives the cause of action may not be authorised, still, if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant'. This doctrine has been approved and acted upon by this Board in *Mackay v. Commercial Bank of New Brunswick*¹, *Suire v. Francis*,² and the doctrine is as applicable to incorporated companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank*³, which is the leading case on the subject. It was distinctly approved by Lord Selborne, in the House of Lords, in *Houldsworth v. City of Glasgow Bank*⁴, and has been followed in numerous other cases".⁵

In the passage here referred to as now the leading authority, Willes J., delivering the judgment of the Exchequer Chamber, said:

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved⁶. That principle is acted upon every day in running down cases. It has been applied also (in various cases of trespass, false imprisonment by servants of corporations acting in supposed execution of their duties under by-laws, and the like). In all these cases it may be said, as it was said here, that the master has not autho-

1. (1874) L. R. 5 P. C. 394.

2. (1877), 3 App. Cas. 106.

3. (1867), L. R. 2 Ex. 259.

4. (1880), 5 App. Cs; 317, at p. 326.

5. *Citizen's Life Assurance Co. v. Brown* (1904) A. C. 423, 427.

6. See *Laughton v. Pointer* (1826) 5 B. & C. 547, at p. 554.

vised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in." As already observed, the words "for the master's benefit," which occur in this judgment, were applicable to the case before the Court, but must not be taken as restricting the scope of the rule. If the act belongs to an authorised class, it is not material whether the agent intends the principal's benefit or not, nor whether the principal in fact derives any benefit.

Misrepresentation by principal or agent where agent or principal has knowledge of the true facts.

Where a principal or his agent makes a representation which is false to the knowledge of either of them, the principal is responsible to the same extent as if the person making the representation had knowledge of its falsity. In this respect the principal and agent are one, and it matters not which of them makes the representation and which had the guilty knowledge.² The principal is similarly liable where one of his agents makes a false representation and another of his agents has knowledge of the true facts³, if the latter also knows that the representation is being made⁴.

Money etc. misappropriated by agent

Where the money or property of a third person is received by an agent while acting within the apparent scope of his authority or is received by the principal; and is misapplied by the agent, the principal is liable to make good the loss.⁵ In *Thompson v Bell*,⁶ a local manager, acting as agent for a bank induced a lady to invest money in paying off a certain mortgage. The money was paid to him for that purpose, and he misappropriated it. Held, that he was acting within the apparent scope of his authority in receiving the money, which must therefore be deemed to have been received by the bank, and that the bank was liable to repay it. Similarly, in *Squire v Francis*⁷ an agent, acting apparently in the ordinary course of business, sent an account to A, representing that certain advances had been made on his account; and drew on him for the amount. It was within the scope of the agent's authority to make advances of that kind, but he had in fact misappropriated the money, and had not made the advances. A accepted and paid the bill. Held, that the principal was liable to A for the amount.

Money, etc. received by, or applied for benefit of, principal.

Where, by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with agent to restore the amount or value of such money (or property)⁸. Where a manager, who had no authority to account, having overdrawn the account and misapplied the money, borrowed £20 for the alleged purpose of paying the principal's workmen (but really to make up the

1. L.R. 2 Ex. 259, at pp. 265, 266.

2. *Pearson v. Dublin Corporation*, (1907) A. C. 351.

3. *London County Freehold, etc. Co v Berkeley, etc. Co* 155 L. T. 190, C. A.

4. *Anglo-Scottish Beet Sugar Corporation v. Spalding U D C* (1937) 2 K B. 607.

5. *Bowstead*, Art. 103, p. 257 and the authorities cited therein.

6. (1854), 10 Ex. 10.

7. (1877), 3 App. Cas. 103.

8. *Bowstead* Art. 104, p. 257.

defalcations), paid it into the principal's account, and drew on the account to pay the workmen, held, that the £ 20 having been applied for the benefit of the principal, he was liable to repay the amount to the lender.¹ Where the secretary of a company forges and discounts certain bills of exchange, and pays the proceeds to his own account, upon which he draws cheques in favour of the company, the company is liable to the discounters to the extent that the proceeds of the bills have been applied for its benefit.² Similarly, where an agent sells, under a forged power of attorney, stock belonging to A, and pays the proceeds to his principal's account, the principal is liable to A for the proceeds.³ In *Glyn v. Baker*,⁴ a banker, having without authority sold certain bonds belonging to A, delivered to A certain other bonds belonging to B, telling A they were taken in exchange for his bonds. Held, that A must deliver up the bonds to B, or pay him their value.

It has been held under the English law that there is no remedy against the Crown, by petition of right or otherwise, for any wrongful act or omission of a public agent⁵.

Crown not
liable for
wrongs of
public agents.
Corporation.

Corporations, under the English law, including incorporated companies, local authorities and statutory undertakers are liable for the wrongs of their agents to the same extent as an individual principal would be, except where the act of the agent is *ultra vires* of the corporation. This extends to cases in which malice in fact is an essential ingredient in the wrong.⁶ Thus, a company is liable for the wrongs of its agents committed in the course of their employment, *e.g.* wrongful detention or conversion,⁷ wrongful distress,⁸ trespass⁹ or fraud¹⁰. In *Lindsey C. C. v. Marshall*¹¹ the medical officers in charge of a maternity home maintained by a county council admitted a patient for her confinement, without informing her that there had been a recent case of puerperal fever in the home and that she would be exposed to infection. The patient contracted puerperal fever. The county council were held liable in damages. But physicians, surgeons and nurses on the staff of a hospital belonging to a local authority do not act as agents of the authority in rendering medical treatment; and the authority is not responsible for their negligent treatment of a patient in this respect, if due care has been exercised by the authority in the appointment of the staff.¹² A constable of the borough police is not the agent of the borough corporation in exercising police duty.¹³

1. *Reid v. Rigby*, (1894) 2 Q. B. 40, *Bannatyne v. Mc Iver*, (1906) 1 K. B. 103; *Everison Fund, etc. Co. v. Masson Conway*, (1918) 1 K. B. 364.

2. *Ex. P. Shoolbred* (1880), 28 W. R. 939.

3. *Marsh v. Keating* (1834) 1 Bing. N. C. 198, *Jacobs v. Morris*, (1902) 1 Ch. 816.

4. (1811), 13 East 509.

5. See Bowstead, Art. 101, p. 249 and the authorities cited therein.

6. Bowstead, Art. 105, p. 258.

7. *Yarborough v. Bank of England*, (1812), 16 East 6; *Barnett v. Crystal Palace Co.* (1861), 4 L. T. 408.

8. *Smith v. Birmingham Gas Co.* (1834), 3 L. J. K. B. 165.

9. *Mound v. Manmouth Canal Co.* (1842), 4 M. & G. 452.

10. *Ranger v. G. W. Ry.* (1854), 5 H. L. Cas. 72, H. L.

11. (1887) A. C. 97.

12. *Evans v. Liverpool Corporation* (1906) 1 K. B. 160; *Hillyer v. St. Bartholomew's Hospital* (1909) 2 K. B. 820; *Strangeway-Leeme v. Clayton* (1936) 2 K. B. 11.

13. *Fisher v. Oldham Corporation*, (1930) 2 K. B. 364.

Railway and tramway companies are responsible for the torts of their servants committed in the course of their employment, *e. g.*, for assaults upon passengers.¹ Such servants have, generally, implied authority to remove passengers from carriages in which they are travelling without having paid the proper fare, or are misconducting themselves; and if, under misapprehension, they eject an innocent person, the company is liable for their acts.² Where a porter, believing that a passenger was in the wrong train, pulled him out of the compartment, it was held that the jury might find that the porter was acting within the scope of his employment, although it was not part of the porter's duty to remove passengers from the wrong train.³ Where the servant of the company is entitled to eject a passenger, the company will be liable if necessary violence be used.⁴ But, in any case, the company will not be liable if the servant be acting from private spite and not in purported pursuance of his duty.⁵

In *Poulton v. L. & S. W. Ry.*⁶, a station-master detained a person for not having paid the fare for his horse, the railway company having no power to arrest in such cases. Held, that the company was not liable, because it was beyond its powers to authorise the detention, and the act was therefore necessarily outside the scope of the station-master's employment. Otherwise, if the company had power to arrest⁷. Where a train conductor gave a passenger into custody for tendering what the conductor thought was bad money, the company was held liable⁸.

In *Citizens' Life Assurance Co. v. Brown*⁹ A, who had been an agent of an insurance company, and had entered the service of a rival company, visited policy-holders in the first mentioned company in order to persuade them to transfer their insurances to the rival company, and made derogatory statements concerning the first mentioned company. B, who was a superintendent of agencies of the first company, in order to counteract the injury A was doing to the company's business, but without being expressly authorised to do so, wrote a circular letter to policy-holders containing defamatory statements concerning A which B knew to be false. It was held that malice of B was imputable to the company, and the libel having been published in the course of B's employment, that the company was liable therefor. So, it has been held that a voluntary association is liable

1. The fact that the agent has been convicted and punished for the assault does not affect the liability of the principal *Dyer v. Munday*, (1895) 1 Q. B. 742.
2. *Loose v. G. N. Ry.* (1893), 62 L. J. Q. B. 524, *Whitaker v. L. C. C.* (1915) 2 K. B. 676.
3. *Bayley v. Manchester, Sheffield and Lincolnshire Ry.* (1873), L. R. 8 C. P. 148.
4. *Seymour v. Greenwood*; *Greenwood v. Seymour*, (1861), 7 H. & N. 855.
5. *Hutchins v. L. C. C.* (1915), 85 L. J. K. B. 1177.
6. (1867), L. R. 2 Q. B. 534. See also *Oxwiston v. G. W. Ry.* (1917) 1 K. B. 598.
7. *Goff v. G. N. Ry.* (1861), 30 L. J. Q. B. 148. A special constable of a railway company is a servant of the company; *Lambert v. G. E. Ry.*, (1909) 2 K. B. 776.
8. *Furlong v. South London Tram Co.* (1884), 48 J. P. 329, *Percy v. Glasgow Corpn.* (1932) 2 A. C. 299.
9. (1904) A. C. 423.

for a libel published by its servant in the course of his employment, though without special instructions.¹ And an action for malicious prosecution is maintainable against a corporation or incorporated company.²

It has been held under the English law that no action will lie against a trade union whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members, in respect of any tortious act alleged to have been committed by or on behalf of the trade union.³

Trade Unions

Again, under the English law, where damage is suffered by any person as the result of a tort, whether a crime or not, judgment recovered against any tortfeasor liable in respect of that damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.

Effect of judgment in tort against principal or agent: contribution.

If more than one action is brought in respect of that damage or on behalf of the person by whom it was suffered, or for the benefit of the estate or of the wife, husband, parent or child of that person against tortfeasors or otherwise, the sums recoverable under the judgments given in those actions may not in the aggregate exceed the amount of the damages awarded by the judgment first given and in any of those actions, other than that in which judgment is first given, the plaintiff will not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action.

Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if used have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this provision from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought.

In any proceedings for contribution under this provision the amount of the contribution recoverable from any person is such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court has power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.⁴

It has been held that no action can be maintained against a principal in respect of any representation as to the character, conduct, credit, ability, trade or dealings of another person, to the intent that such other person may obtain credit, unless such

Misrepresentation by agent as to credit, etc. of third persons.

1. *Ellis v. National Free Labour Assn.*, (1805), 7 F. 629.

2. *Cornford v. Carlton Bank* (1899) 1 Q. B. 392.

3. Rowstead, Art 106, p. 261 and the authorities cited therein. The section applies whether the alleged wrong is committed in contemplation or furtherance of a trade dispute or not: *Vacher v. London Society of Compositors*, (1913) A.C. 107; It extends to an action for an injunction. *Ware and De Freville v. Motor Trades Assn.* (1921) 3 K. B. 40.

4. Rowstead, Art. 107, p. 261.

representation is in writing, signed by the principal—the signature of an agent is not sufficient, even if expressly authorised by the principal.¹

75. Admissions by agents.

S. 18 of the Evidence Act provides that statements made by an agent to a party to any proceedings, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised to make them, are admissions; and S. 21, that admissions are relevant and may be proved as against the person who makes them. The Contract Act is silent on the subject; but the following statement of the English law, on which the provisions of the Evidence Act are evidently founded, will be useful.

Agent's admissions when evidence against the principal.

An admission or representation made by an agent is admissible in evidence against the principal in the following cases; namely,

(a) Where it was made with the authority, express or implied, of the principal;

(b) where it has reference to some matter or transaction upon which the agent was employed on the principal's behalf at the time when the admission or representation was made in the course of that employment;

(c) where it has reference to some matter or transaction respecting which the person to whom the admission or representation was made had been expressly referred by the principal to the agent for information.

Provided always, that a report made by an agent to his principal cannot be put in evidence against the principal by a third person as an admission made on behalf of the principal.

No principal is bound by any unauthorised admission or representation concerning any matter upon which the agent who made it was not employed on his behalf at the time when it was made, or which was not made in the course of the agent's employment, unless be expressly referred to the agent for information on the particular matter².

Where the admission made by agent binds the principal, it binds him to the same extent as it would have done if he had made it himself³.

Where a parcel sent by railway was lost in transit and the stationmaster in the ordinary course of his duty, made a statement to the police as to the absconding of a porter, the statement was held admissible in evidence as an admission by the railway company⁴.

A shipmaster contracted by charterparty to carry certain goods. In an action against the shipowners for not carrying and delivering certain of the goods, letters written by the master

1. Statute of Frauds Amendment Act, 1828 (9 Geo. 4, C 14), S. 6 - See Bowstead Art. 108, p. 263 and the authorities cited therein.

2. Bowstead, Art 109, p 263; Halsbury, Vol. I, 2nd Edn., Art 476, p 290

3. Halsbury, *ibid*

4. *Kirkcaldy Brewery v Furness, & Co* (1874), L. R. 9 Q B 468.

to the plaintiff were admitted in evidence to show that the goods had been duly received¹. So, where an agent, who was employed to buy certain goods, acknowledged having received them, it was held that the acknowledgment was evidence of a delivery to the principal².

A promise by an agent employed to pay workmen for the work done can be used against the principal as evidence that money is due, and if in writing and signed as an acknowledgment, to prevent bar of limitation³. So is a statement of account by a wife carrying on business on her husband's behalf and purchasing all the goods required for such business⁴. So, a part payment by an agent, in the course of his employment, of a debt owing by the principal, interrupts the operation of the statute of Limitations⁵.

A solicitor or counsel is retained to conduct an action. Statements made by him in the conduct and for the purposes of the action are evidence against the client⁶. Where an officer or member of a corporation or company answers interrogatories on its behalf, the answers may be read as an evidence against A⁷. Where A refers B to C for information concerning a certain matter, statements made by C to B, concerning that matter are evidence against A⁸.

But any statement made by an agent to his principal cannot be used by any third person as evidence against the principal as it falls within the privileged communications⁹. Where the chairman of a company made a statement at a meeting of shareholders, it was held that such statement could not be used as evidence against company by a third person¹⁰. So, where an agent wrote letters to his principal containing an account of transactions performed on his behalf it was held that such letters could not be put in evidence against the principal by any third person¹¹.

Where the secretary of a tramway company represented that certain money was due from the company, it was held that the company was not estopped by such representation from saying that the money was not due, because it was not within the scope of the secretary's employment to make any such representation¹². Similarly, where an agent, authorised to pay a certain sum of money in exchange of the whole debt due from the principal, on the creditor refusing to accept the amount in full discharge of the debt, paid it in part payment being beyond the ordinary scope of the agent's employment could not

1 *British Columbia, etc. Co. v. Nettleship* (1868), L. R. 3 C. P. 310

2 *Riggs v. Lawrence* (1789), 8 T. R. 454

3 *Burt v. Palmer* (1804), 5 Esp. 143

4 *Anderson v. Sanderson*, 2 Stark 204; *Emerson v. Blonden* (1794), 1 Esp. 142

5 *Jones v. Hughes* (1850), 5 Ex. 104, *Re Ha's, Lilley v. Load*, (1899) 2 Ch. 107

6 *Marshall v. Cliff*, (1815), 1 Camp. 133; *Halter v. Worman* (1861) 3 L. T. 711

7 *Walsbach etc. Co. v. New Sunlight Co* (1900) 2 Ch. 1.

8 *Williams v. Innes* (1808), 1 Camp. 364.

9 *Re Diamli (Sumatra) Rubber Estates*, 107 L. T. 631, *Reynes v. Pearson*, 4 Taunt. 662; *Kahl v. Jansen*, 4 Taunt. 565

10 *Re Devonia Provident, etc. Co., Ex p. Abbott*, 22 Ch. D. 593

11 *Langhorn v. Alhutt*, 4 Taunt. 511.

12 *Bennett v. South London Tram Co*, 18 Q. B. D. 815, C. A.

be used by the creditor against the principal to prevent bar of his claim by the statute of limitation¹. So statements made by a solicitor or counsel retained for the conduct of an action, not in the course of or in connection with and for the purpose of the conduct of the claim but only in casual conversation², or in connection with and for the purpose of another action of the same client³, cannot be used as admissions of the client.

In an action against a railway company for not delivering certain cattle within reasonable time, it appeared that a servant of the company, a week after the alleged cause of action arose, in answer to the question why he had not sent on the cattle, said that he had forgotten them. Held, this admission was not admissible in evidence against the company, because it concerned a bygone transaction⁴.

Consequences
of notice
given to
agent.

76. Notice to the agent when and how far equivalent to notice to principal.

Any notice to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequences as if it had been given to or obtained by the principal.

ILLUSTRATIONS

- (a) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale A learns that the goods really belonged to C, but B is ignorant of that fact. B is not entitled to set off a debt owing to him from C against the price of the goods.
- (b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

(S. 229, *Indian Contract Act, 1872*)

The rule laid down above is intended to declare a general principle of law. "It is not a mere question of constructive notice or influence of fact, but a rule of law which imputes the knowledge of the agent to the principal, or, in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings."

But by the terms of the present section, which are cited in the same judgment, the application of the principal is limited by the condition that the agent's knowledge must have been obtained "in the course of the business transacted by him for

1 *Linsell v Bonsor* (1835), 2 Bing N C 211

2 *Petch v. Lyon* (1846), 9 Q B 147, *Parkins v. Haulshaw* (1914), 9 Q B. 1472
Stark 239, *Richardson v Peto* (1840), 1 M & G 896

3 *Blackstone v. Wilson*, (1957) 23 L J Ex 22)

4 *G. W. Ry v Willis* (1865), 34 L J C P 195; *Johnson v. Lindsay* (1989), 58 J P. 599

5 Judgement of the Privy Council in *Rampal Singh v. Balbhadar Singh* (1902) 29 I A 209, at p 212

the principal." This is further enforced by illustration (b), which appears to be taken from decision of the court of Common Pleas in 1863. Here the general rule was laid down as being "that whatever an agent does within the scope of his employment, and whatever information comes to him in the course of his employment, as agent, binds his principal".² This limitation, however, was rejected by the court of Exchequer Chamber, which unanimously reversed the decision of the Common Pleas, and held that the buyer was not entitled to set off a debt due to him from the factor. "We think", the court³ said, "that in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name the knowledge of the agent, however acquired, is the knowledge of the principal."

Pollock and Mulla comment⁴:

"Thus the law of British India on this point follows the reversed decision of the Court of Common Pleas. It may have been a deliberate preference, or it may be permissible to conjecture that the section was originally drafted in 1864 or 1865, before the report of the case in the Exchequer Chamber was published, and that report was afterwards overlooked. Probably the difference is seldom of practical importance, but it seems inconvenient that such a difference should exist between English and Indian law without very strong reasons".

Bowstead⁵ thus states the English law on the subject:—

"Where any fact or circumstance, material to any transaction, business or matter in respect of which an agent, is employed, comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken. Provided that—

(a) Where an agent is party or privy to the commission of a fraud or misfeasance upon or against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal; and

(b) Where the person seeking to charge the principal with notice knew that the agent intended to conceal his know-

1. See *Chahildas Lallobhai v. Dayal Mowji* (1907) 34 L. A. 179 at p. 184=31 Bom. 566, at p. 581.
2. *Dresser v. Norwood* (1868) 14 C.B.N.S. 574, 597, *per* Erle C. J. Willes J. and Keating J. delivered judgments to the same effect.
3. S.C. in Ex. Ch 1864, 17 C.B.N.S 466, 481. This is contrary to Story's opinion S.A. (S. 140), but is accepted by his later editors and in American decisions to which they refer.
4. Indian Contract & Specific Relief Acts, 7th Edn, p. 600.
5. Art. 110, p. 267.

ledge from the principal, such knowledge is not imputed to the principal.

Knowledge acquired by an agent otherwise than in the course of his employment on the principal's behalf, or of any fact or circumstance which is not material to the business in respect of which he is employed is not imputed to the principal."

The following are illustrations from the English authorities of the rule stated in section 229 of the Indian Contract Act:

An agent of an insurance company having negotiated a contract with a man who had lost the sight of an eye, it was held that the agent's knowledge of the fact must be imputed to the company, and that it could not avoid the contract on the ground, of non-disclosure thereof by the assured¹.

A ship was driven on a rock and damaged. The master afterwards wrote a letter to the owner, but did not communicate the fact of the ship having been damaged, and, subsequent to the receipt of the letter, the owner insured the ship. Held, that the master ought to have communicated the fact, and that therefore the owner must be deemed to have had knowledge of it at the time of the insurance². So where an agent shipped goods, and having heard of loss, purposely refrained from telegraphing to the principal because he thought it might prevent him from insuring, it was held that it was his duty to have telegraphed; and that an insurance effected by the principal after the time when he would have received the telegram was void on the ground of non-disclosure of material facts³.

The knowledge of an agent is not imputed to the principal unless it is of something that it is his duty as agent to communicate to the principal. A broker was employed to effect an insurance, but did not effect it. Subsequently, another broker effected a policy in respect of the same risk, on behalf of the same principal. It was sought to avoid the policy on the ground of the non-disclosure of a material fact which had come to the knowledge of the first-mentioned broker in the course of his employments, but which he had not communicated to the principal, and which was not known, either to the principal or to the broker who effected the policy. Held, that the policy was valid⁴. It is not the duty of a broker who is employed to effect an insurance to communicate material facts coming to his knowledge to the principal, but only to the insurer.⁴

Nor will notice given to or information acquired by an agent of circumstances which are not material to the business in respect of which he is employed be imputed to the principal. Thus where directors of a banking company, who had no voice in the management of the accounts, acquired a knowledge of certain circumstances relating to the accounts, it was held that

1. *Bowden v. London, etc. Ass. Co.* (1892) 2 Q.B. 534, C.A.

2. *Gladstone v. King*, (1813) 1 M. & S. 35.

3. *Proudfoot v. Montefiori* (1867), L.R. 2 Q.B. 511.

4. *Blackburn v. Vigors*, (1887) 12 App. Cas. 581.

this did not operate as notice of such circumstances to the company¹. In *Tate v. Hyslop*², an underwriter sought to avoid a policy on the ground of the non-disclosure of a material fact. The fact had been disclosed to his solicitor, but had not been communicated to him. Held, that he was not bound by the disclosure made of a solicitor's employment to receive mercantile notices as mercantile transaction.

The secretary or a director of a company, in his private capacity, and when he is not transacting the business of the company, casually acquires knowledge of certain facts concerning the company's business. That does not operate as notice to the company of such facts³. So, if a person is secretary of two companies, knowledge acquired by him as secretary of one of the companies will not be imputed to the other company, unless the knowledge was acquired in such circumstances as to make it his duty to communicate it to such other company⁴.

An important exception to the rule that the knowledge of an agent is equivalent to that of the principal exists in cases where the agent has taken part in the commission of a fraud on the principal. In such cases notice is not imputed to the principal of the fraud or the circumstances connected therewith, because of the extreme improbability of a person defrauded⁵. So, where the directors of a company took part in a misfeasance against the company, it was held that their knowledge did not operate as notice to the company of the misfeasance⁶. On this ground it has been held in India that notice will not be presumed to have been given by an attorney to his client, when such notice would involve a confession by the attorney of a fraud practised by himself⁷. But the exception does not apply where the fraud is committed, not against the principal, but against a third person⁸.

The constructive notice of a fact which the agent knew cannot be imputed to the principal when it was not to the interest of the agent to disclose the fact to the principal and which the agent did not in fact disclose⁹. But the mere fact that the agent has an interest in concealing facts from his principal is not sufficient to prevent his knowledge of those facts from being imputed to the principal where it is his duty to communicate them¹⁰. Where a solicitor induced a client to advance money on mortgage, and afterwards induced another client to advance money on the same land, it was held that the last mentioned client must be deemed to have had notice of the

1. *Powells v. Pugh* (1846), 3 C.B. 16.
2. (1885), 15 Q.R.D. 363. See also *Texas Co. v. Bombay Banking Co.* (1920) 46 I. A. 250=44 Bom. 139=44 I.C. 121; *Wilde v. Gibson*, (1848) 1 H.L. Cas. 605.
3. *Societe Generale de Paris v. Tramways Union Co.* (1884), 14 Q.B.D. 424; *Re Payne Young v. Payne*, (1904) 2 Ch. 608.
4. *Re Fenwick, Deep Sea Fishery Co.'s Claim* (1902) 1 Ch. 507.
5. *Cave v. Cave*, *Chaplin v. Cave* (1880), 15 Ch. D. 639.
6. *Re Fitzroy Beaumont Steel Co* (1884), 50 L.T. 144.
7. *Hormaji v. Mankunahai* (1875) 12 B.H.C. 262.
8. *Bowdoin v. Savage* (1866) L.R. 2 Eq. 184; *Dixon v. Finch* (1900) 1 Ch. 786.
9. *The Texas Co. v. Bombay Banking Co.* 46 I.A. 250=44 Bom. 139.
10. *Thompson v. Cartwright* (1863), 33 Beav. 178.

prior mortgage¹. Similarly, where a solicitor sells or mortgages property and himself draws the purchase or mortgage deed and carries the transaction through on behalf, and with the consent, of the purchaser or mortgagee, the purchaser or mortgagee must be deemed to have notice of all circumstances known to the solicitor even if the solicitor fraudulently conceal them².

An insurance proposal form, signed by the proposer contained untrue answers which were warranted to be true and which formed the basis of the contract. The answers were filled in by the insurance company's agent, whom the proposer had requested or permitted to fill in the form, after informing him of the true facts. Held, that the company were entitled to repudiate liability on the ground of the untrue answers³. The agent, in filling in the form, was the agent of the proposer. If the agent knew that the answers were untrue, he was committing a fraud which prevented his knowledge being the knowledge of the company; if he did not know, he had no knowledge to be imputed to the company.³

It is to be observed that notice through an agent is not the same thing as constructive notice, and should not be confused with it. The agent's knowledge is imputed to the principal without regard to any question of what the principal in person knew or might have known. Such is not the nature of constructive notice. A man is said to have constructive notice of that which he is treated as having known because, though not proved to have actually known it, he might and ought to have known it with reasonably diligent use of the means of knowledge at his disposal. Now an agent's constructive as well as his actual notice may be imputed to the principal in any transaction where constructive notice has to be considered at all⁴. On the whole, then, a man may have notice either by himself or by his agent, and that notice may be either actual or (in an appropriate case) constructive⁴.

Indian Cases.

A mortgagor employing an attorney, who also acts for the mortgagee in the mortgage transaction, must be taken to have notice of all facts brought to the knowledge of the attorney. So where there are co-vendees, and they stand to each other as principal and agent notice to one is notice to another. Such notice is imputed to the principal and fixes him with knowledge whether it is communicated to him or not though an exception is admitted to this rule where there has been fraud on the part of the agent⁵. In a contract for sale of goods, the vendors gave notice to the agent of the purchaser to take delivery of the goods agreed to be sold. Held, that this was a sufficient notice and that the vendors were not liable to be sued for breach of contract⁷. On the same principle, the knowledge

1. *Rolland v. Hart* (1871), L. R. 6 Ch. 678.

2. *Atterbury v. Wallis* (1856), 25 L. J. Ch. 465, C.A.

3. *Neschohne v. Road Transport, etc. Co* (1929) 1 K. B. 356; *Dunn v. Olean Accident, etc.* (1939) 50 T. L. R. 32, C.A.

4. See *Pollock & Mulla*, p. 602.

5. *Brahmo Datt v. Dharmo Das*, 26 Cal. 381.

6. *Hasila v. Haveli Ram* A. I. R. 1929 Lah. 500—119 I. C. 754

7. *Niamat Rai v. Kahu Ram*, 159 P. L. R. 1918,

of the Chairman and Manager of a Bank is to be regarded as its own knowledge¹. Notice of a condition in the bill of lading signed by a broker on behalf of the shipowner should be imputed to the principal².

The knowledge of the agent must have been gained in the course of the business transacted by him for the principal³, and the knowledge of the agent prior to his employment does not, therefore, operate as a notice to the principal⁴.

Where the agent, though acting on the principal's behalf in some transaction in which his knowledge would otherwise be imputed to his principal, takes part in any fraud or misfeasance against the principal the principal is not bound by the agent's knowledge of such fraud or misfeasance⁵.

Though notice of facts to an agent is constructive notice thereof to the principal himself where it arises from, or is at the time connected with, the subject matter of his agency, it is quite open to the parties to a contract to stipulate that this presumption which arises upon general principles of public policy should not arise in any particular case, and that the notice instead of being served on an agent would have to be served on the principal himself⁶.

77. Principal is not bound by acts of agent beyond scope of authority or not done in course of employment.

When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Principal how far bound when agent exceeds authority.

ILLUSTRATION.

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the cargo.

(S. 227, *Indian Contract Act, 1872*)

Where an agent does more than he is authorized to do and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Principal not bound when excess of agent's authority is not separable

ILLUSTRATION.

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

(S. 228, *Indian Contract Act, 1872*).

1 *Co-operative Town Bank v. Shanmugam*, A. I. R. 1930 Rang. 265=125 I. C. 865.

2 *Standard Oil Co. v. Haridax*, A. I. R. 1921 Sind. 121=79 I. C. 486.

3 *See Chabildas v. Dayal Nourjun*, 34 I. A. 179. 31 Bom. 596.

4 *Gunabai v. Motilal*, A. I. R. 1925 Nag. 398=89 I. C. 625.

5 *Shirali v. Tyccundras*, 36 Bom. 564.

6 *R. S. N. Co. v. Disuvascar*, A. I. R. 1928 Cal. 371=116 I. C. 118.

Liability of principal, in-
flicting be-
lieve that
agent's un-
authorized
acts were
authorised.

When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

ILLUSTRATIONS.

- (a) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.
- (b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

(S. 237, *Indian Contract Act, 1872*.)

The English law on the subject in thus stated by Bowstead:¹

"No principal is bound by any act of his agent, which is not done in the course of the agent's employment on his behalf, or by any act which is not within the apparent scope of the agent's authority, unless the principal in fact authorised the agent to do the particular act

This article is subject to the provisions of Articles 84 to 87."

Duty of the
third person
to ascertain
the authority
of the agent.

As already observed, it is the duty of a person who deals with an assumed agent at his peril to ascertain the nature and extent of the agent's authority. The very fact that the agent assures to exercise a delegated authority is sufficient to put the person dealing with him upon his guard, to satisfy himself that the agent really possesses the pretended authority. If having relied upon it, he seeks to hold the alleged principal responsible, he must be prepared to prove not only that the agency existed but also that the agent had the authority which he exercised. But it is not essential that an actual authority existing should have known and specifically relied upon at the time of dealing with the agent. If it existed, it may be proved, even though the other party did not then rely upon it.²

Again, authority of an agent may be express or implied. It is not only the words spoken or written by the principal which constitute the authority but also all the acts, omissions and commissions which had a legitimate inference that the particular act or acts are authorised by the principal. So far as third persons are concerned it is the apparent or ostensible authority, which it is generally beyond his power to ascertain. Such authority may be wielded by the agent and is generally authority for the persons dealing with him, to rely upon, even though there may be secret instructions to the contrary. The agent is, however, responsible to the principal for his acts and contracts which he does or enters into in excess of the authority conferred on him or which he can legally exercise and for the disobedience of the principal's secret instructions in spite of the fact that such act or contract is binding on the principal so far as third persons are concerned.³

1. Article 83, p. 208.

2. See Katjar, pp. 640, 641.

3. See Katjar, pp. 641, 642.

The gist of sections 227, 228 and 237 of the Indian Contract Act, 1872, is that when the agent exceeds the authority the principal is not bound by the acts and contracts done or entered into by him in any case so far as the agent is concerned, but so far as third persons are concerned he may or may not, be bound according as such third persons act in good faith without notice that the agent was so acting or otherwise and according as the principal is estopped by his conduct to deny authority or is not so estopped. When an agent does more than he is authorised to do and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only what he does as is within his authority is binding as between him and his principal. But where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction. When, however, an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Principal's liability when the agent exceeds the authority.

Thus, when an agent authorised to stand surety for one person stands surety for two persons in addition, outside the scope of his authority, the unauthorised act of the agent is clearly separable from his act in standing surety for the person authorised, and the principal's liability will be restricted to that person only under section 227 of the Contract Act¹.

In *Baines v. Ewing*² B, an insurance broker at Liverpool, was authorised by A to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed £100 by any one vessel. B underwrote a policy for Z, without A's authority or knowledge, for £150. Z did not know what the limits of B's authority were, but it was well known in Liverpool that a broker's authority was almost invariably limited, though the limit of the authorised amount in each case was not disclosed. The court held that A was not liable for the insurance of £450 which he had not authorised, and the contract could not be divided, so as to make him liable for £100. The only argument to the contrary was, that in the circumstances B must be regarded as a general agent whose powers could not be limited by any instructions.

A authorises B to draw bills to the extent of Rs.200 each. B draws bills in the name of A for Rs. 1,000 each. A may repudiate the whole transaction³.

A instructs B to enter into a contract for the delivery of cotton at the end of January. B enters into a contract for delivery by the middle of that month. A is not bound by the

1. *Mayandi v. Raman Chettyar*, A.I.R. 1937 Rang. 499.

2. (1866) L.R.I. Ex. 320. The law is the same if the agent is authorised to raise not less than a certain sum on the security of documents of title and does raise less: *Fry v. Smellie* (1912) 3 K. B. 282, C.A.

3. *Prembhat v. Brown* (1878) 10 B.H.C. 319.

contract and any custom of the market allowing B to deviate from A's instructions will not be enforced by the court¹.

Where a bank makes a payment on a forged cheque, he cannot make the customer liable except on the ground of negligence imputable to the customer². So also, where a *moktarnama* gives authority to borrow the *mooktear* has no authority to bind the principal by a statement³.

As a general rule, an agent has no authority to borrow money on account of the principal so as to render the latter liable to the lender, unless the principal has given express authority or previously sanctioned such a course of dealing on the agent's part or has subsequently adopted or ratified the loan⁴. Similarly, an agent authorised to act in reference to the principal's bond and the charges thereon cannot bind him by acknowledging a personal debt⁵.

Where a principal has, by his words or conduct, induced a third person to believe that the agent's acts were within the scope of his authority, he is bound by such acts of his agent though in excess of his authority. Thus in *Fazal Illahi v East Indian Railway Company*⁶, a parcel office clerk of a railway company received for despatch a consignment of fire-works as a 'parcel' instead of as 'goods' according to rules. The railway company made delay and ultimately sent it by goods train and claimed extra freight charges which the consignor refused to pay. The company sold the goods. The consignor then brought a suit for damages. Held, that in accepting the goods for despatch as parcel the clerk was undoubtedly acting in the course of his employment though outside the scope of his authority and led the plaintiff into an honest belief of his authority. The company could not, therefore, repudiate the contract or escape the liability for any damage incurred by the plaintiff in their not carrying out the contract within reasonable time.

"A man is not permitted to resist an inference which a reasonable person would necessarily draw from his words or conduct." "Strangers can only look to the act of the parties and to the external *indicia* of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority." Where articles of association of a company giving power to the managing agents to borrow for the company were adopted, and they were found to be legally invalid, but were treated by the company and submitted to the public as being genuine and legally adopted articles of association of the company, held, that the company

1. *Arlapn Nuyak v. Narsi Keshavji*, (1871) 8 B.H.C.A.C. 19.

2. *Bhagywan Das v. Crest*, 31 Cal. 249.

3. *Sudisht Lal v. Mst Sheobasat*, 7 Cal 245, P.C.

4. *Bhagwanji v. Ganga*, 10 S.L.R. 72=76 I.C. 968.

5. *Beti Manarji v. The Collector of Etawah*, 17 All. 198, P.C.

6. 43 All 625 S.C.=64 I.C. 868.

7. Anson, pp. 405, 406, 17th Edn.

8. Per Lord Ellenborough, *Pickering v. Bush*, 15 East 38, 43.

could not set up the invalidity of the said articles'. In *Ram Partab v. G. Marshall*¹, the right of a third party against the principal on a contract of his agent, though made in excess of the agent's authority, was nevertheless enforced where the evidence showed that the contracting party was led into an honest belief in the existence of the authority to the extent apparent to him.

Where the owner induced third persons to believe that the auction-sale was within the scope of the auctioneer's authority, the owner, as principal, was bound by the auction-sale and was liable to third persons for breach of the contract although the auctioneer might have practised fraud in selling at a price lower than the amount authorised by the owner.² Similarly, where a suit is brought against the principal for price of goods supplied on credit for him through his servant, if the plaintiff shows a course of dealing by which it was a practice for goods to be supplied to the principal through the servant in the course of his employment, it will be no answer for the principal to say that the particular item of goods did not reach him once the plaintiff has established that they were supplied to his servant for his use³. On the other hand, where a servant of a firm with very limited powers orders for goods in the name of the firm with which the vendor had no previous dealings, the vendor could not be said to have been influenced by the fact that the firm held out the servant as its authorised agent to order goods on its behalf, and so the firm could not be made liable for the goods⁴.

Section 237 of the Contract Act must in point of fact, overlap S. 188 of that Act in many cases, but the principles are distinct. Under S. 188 the question is of the true construction to be put upon a real, though perhaps not verbally expressed, authority. Here the liability is by estoppel, and independent of the apparent agent having any real authority at all; the question is only whether he was held out as being authorised; and this includes the case of *secret restrictions* on any existing authority of a well-known kind. It is a "well-established principle that, if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority"⁵. "Good faith requires that the principal shall be held bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts and to bind him thereby."⁶ "If a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority". It is clear that he (the agent) may bind his principal within the limits of the authority with which

1 *Kunji Kishore v. Official Liquidator*, 96 All 416.

2 26 Cal. 701.

3 *Dasburi v. Shariff Hussain*, 1929 All 822=121 I.C. 511.

4 *Mat Suga Kuer & Firm Brijraj*, A.I.R. 1937 Pat 526=108 I.C. 986.

5 *Firm Govindram v. Firm Partab Singh*, A.I.R. 1937 Sind 151=169 I.C. 423.

6 *Cockburn C. J. in Edmunds v Bushell* (1865) L.R. 1 Q.B. 97, 99. See also *Chhotey Lal Panna Lal v. R. K. Railway*, A.I.R. 1932 All. 540=138 I.C. 439.

7 *History on Agency*, §. 127.

he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. . . If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one sends goods to an auction-room, can it be supposed that he sent them thither merely for safe custody." Similarly, where a transaction undertaken by an agent on behalf of his principal is within his express authority the principal is bound without regard to the agent's motives, and inquiry whether the agent was abusing his authority for his own purposes is not admissible².

Limited
authority of
the agent.

It is to be observed that a person who deals with an agent whose authority he knows to be limited does so at his peril, in this sense, that should the agent be found to have exceeded his authority the principal cannot be made responsible. In order that the principle of "holding out" should, in any given case of agency, apply, the act done by the agent, and relied upon to bind the principal, must be an act of that particular class of acts, which the agent is held out as having a general authority on behalf of his principal to do. But if the agent be held out as having a limited authority to do on behalf of his principal acts of a particular class, then the principal is not bound by an act done outside that authority, even though it be an act of that particular class, because the authority being thus represented to be so limited, the party prejudiced has notice, and should ascertain whether or not the act is authorised. Where the principal did not by any negligent or improper act allow the agent to be apparently invested with an authority beyond or greater than the limited authority which the customer knew him to possess, there could not be any estoppel against the principal in respect of any of the steps in a transaction whereby the customer was deceived by the agent acting beyond his authority.³

Private in-
structions

Private instructions issued by a principal to an agent are not binding on a third party unless the latter has notice.⁴ Thus in the case of a general agency which implies a delegation to do all acts connected with a particular trade, business or employment, it would be the height of injustice and lead to the greatest frauds to allow the principal to set up his own secret and private instructions to the agent limiting his authority and thus to defeat the agent's acts and transactions under the agency when the party dealing with him had and could have no notice of such instructions.⁵ The maxim of natural justice here applies that he, who without intentional party shall himself suffer the injury rather than the innocent party, who has confidence in him.⁶ Where an agent was instructed by his principal to do a particular act, but he was instructed not to deliver the document except on certain conditions which were not specified in the

1 Lord Ellenborough CJ *Pickering v Bush*, (1812) 15 East 38, Cp B 27, of Sale of Goods Act, 1930

2 *Hambro & Co v. Bank of Bengal v. Fagan* (1849) 7 Moo P 661 74

3 *The Russo-Chinese Bank v. Li Yan Sam* 14 C. W. N 381, P C

4 *Chhotey Lal v. R. K. Ry.*, 1932 All 540=54 All 557

5 *R S N Co v. Bismarck*, 1928 Cal 371=116 I C 148

document, the agent, however, delivered the document unconditionally, it was held that the principal was bound by the consent although he signed the document without reading it.¹ So, where a principal gave a power of attorney to his agent authorising him to charge and transfer, in any form whatsoever any estate following the principal's letters of instructions and private advices which if necessary should be considered part of the powers of attorney, it was held that the principal was bound by a mortgage executed by the agent although as between the principal and the agent such mortgage was unauthorised.² Where a principal wrote: "I have authorised A to see you and if possible to come to some amicable arrangement," and gave A private instructions not to settle for less than a certain amount it was held that he was bound by A's settlement for less than that amount, the instructions not having been communicated to the other party.³ Also, where a principal gave his agent signed form of promissory note for a certain amount but the agent in breach of these conditions filled it up for a larger sum than he was authorised to do and negotiated it to some other person, who took it in good faith and for value without notice of the circumstances, the principal was held liable to such person on the bill or note so filled up.⁴ But the principal would not be bound in such case if the person who took the bill of exchange or promissory note, had had notice of the circumstances under which the document was issued;⁵ or if the principal had not authorised the agent to fill up or negotiate the instrument unless and until he received instructions from the principal in that behalf.⁶ Similarly, where a resident agent and manager of an unincorporated mining company orders goods which are necessary for working the mine, the shareholders are liable for the price though the regulations of the company provide that all goods shall be purchased for cash, and no debt shall be incurred, unless the person supplying the goods had notice that the agent was exceeding his authority.⁷

No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that in doing the act the agent is exceeding his authority.⁸ Where the regulations of a company are registered, persons dealing with the directors and other agents of the company are for the purposes of this article deemed to have notice of such regulations.⁹ Under the English law, a signature "per procuration" on a bill of exchange, promissory note, or cheque, operates as notice that

Notice of
excess of
authority.

1. *Beaufort v. Neeld*, 12 C & F 248 H L

2. *Davy v. Waller*, 81 L. T. 107

3. *Trickett v. Tumlison*, 13 C B N S 663.

4. *Lloyd's Bank v Cooke* (1907) 1 K B 791, *Montague v Perkin*, 22 L. J. C. P. 187.

5. *Hatch v. Searles*, 24 L J. Ch. 22.

6. *Smith v Prosser*, (1907) 2 K. B 735

7. *Hawken v. Bourne*, 8 M & W 703

8. See Bowstead, Art 89, p 222.

9. *Ibid*

the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority¹.

The rule quoted above needs hardly many authorities to be cited in support of it being quite obvious. A few may be added. An agent, who was appointed by a power of attorney, borrowed money on the faith of a representation by him that the power gave him full authority to borrow, and misapplied it. The agent produced the power, which did not authorise the loan, but the lender did not read it, and made the advance in reliance on the agent's representation. It was held that the principal was not bound by the loan². Where an act or contract of a director or agent of an incorporated company or association is *ultra vires*, it is not binding on the company or the association in as much as the powers of the company being limited by the registered regulations such limitations are notice to all the persons dealing with its directors and agents³. Otherwise if the contract had been within the scope of the authority of the directors, and they had merely omitted to observe the formalities required by the articles of association, the other contracting party not having notice of such omission, In *Zulueta's Claim*⁴, the directors of a company instructed a broker to purchase on behalf of the company, some of the company's own shares. The broker purchased and paid for the shares, and the company credited him with the amount. Held, that the transaction being *ultra vires* to the knowledge of the broker, the liquidation of the company was entitled to deduct the amount so credited from the debt for which the broker proved in the binding up of the company.

In *Ram Pertab v. Marshall*⁵ the principal was held liable upon a contract entered into by his agent in excess of his authority the evidence showing that the contracting party might honestly and reasonably have believed in the existence of the authority to the extent apparent to him.

Equitable
obligation of
principal for
benefit
derived

If the act belongs to an authorised class, it is not material whether the agent intends the principal's benefit or not, nor whether the principal in fact derives any benefit⁶. But where money is borrowed on behalf of a principal by an agent, the lender believing that the agent had authority though it turns out that his act was not authorised, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal

1. Bowstead, Art 89, p 222

2. *Jacobs v Morris* (1902) 1 Ch 816

3. *Balfour v Ernest* (1859), 5, C. R. (N. S.) 601

4. (1870), L. R. 5 Ch. 444

5. (1899) 26 Cal. 701

6. *Jayantilal v. Popatlal*, 1937 Bóm. 262=170 I C.147.

the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal.¹

Unless the relationship of principal and agent is proved to exist between the parties, section 237 of the Indian Contract Act can have no application. A custodian of goods for safe custody is a bailee so that a pledge by him will not affect the true owner². A District Board is not liable for the price of goods supplied at the order of an independent contractor though the goods were consigned to the District Engineer who had on several occasions placed orders on behalf of the District Board³. Further, it is of the essence of an authority by "holding out" that the other party to the contract by reason of such holding out should have been induced to enter into the contract⁴. Also a principal is not bound by any act done by his agent which he has not in fact authorised, unless it is done in the course of the agent's employment on his behalf⁵ and is within the scope of the agent's apparent authority⁶.

Section 237 of the Contract Act does not apply when relationship of principal and agent does not exist.

78. Agent acting as principal

When the agent acts as principal, he may do so on his own behalf or ostensibly on his own behalf but really on behalf of his principal. Again, in the former case he may be dealing in the business of the agency but in breach of his duty not to deal on his own behalf or he may be dealing on a matter outside the business of his agency. In the latter case the party dealing with him might be knowing that he is only an agent for somebody whose name is not disclosed at the time or he might be taking the agent as the principal without any knowledge that he is acting as agent of somebody. In neither of the two positions involved in the former case is the principal responsible to the third persons for the acts of his agent, but in the first position as he is entitled to all the benefits that arise from such dealings, if he chooses to take the benefit he can do so subject of course to all the obligations for which the agent is liable to third person. In either of the two positions involved in the latter case however, the principal can sue and be sued in the same way as if the act had been done by him personally⁷. The law applicable is as follows —

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Agent cannot personally enforce, nor be bound by contracts on behalf of principal.

1 *Bannatyne v Macneil*, (1906) I K B 103 foll in *Kasim v Narayan* 1930 Nag 42=122 I C 144

2 *Hemas Bank v Prem & Co*, 1937 All 255

3 *Joasep & Co v D B of Monghyi*, 1931 Cal 423 - 132 I C 907

4 *Chettiar Firm v Chettiar Firm*, 1934 Rang 61

5 *Mc Gowan v Dyer* (1878), L R 8 Q B 141, where the managing director of a company obtained payment of a private debt out of certain funds in breach of an understanding between the debtor, who was also indebted to the company and a surety for his debt to the company, and it was held, in an action by the company against the surety that the company was not responsible for the conduct of the managing director in the matter

6 See cases cited at pp 516 to 520 and *Morais Priests v Murli Ranchod Ved & Co* A I B 1934 Bom 232, of which the practical moral is that cheques to bearer are not safe, even if crossed

7 See *Katkar*, p 646, *Bowstead*, Art 91, p 224.

**Presumption
of contract
to contrary.**

Such a contract shall be presumed to exist in the following cases:—

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad:
- (2) Where the agent does not disclose the name of his principal:
- (3) Where the principal, though disclosed, cannot be sued.
(S. 230, Indian Contract Act, 1872.)

**Agent when
can sue.**

Under S. 226 of the Indian Contract Act, the principal may sue in his own name on a contract entered into by his agent with third parties. But an agent cannot personally enforce contract entered into by him on behalf of the principal nor is he personally bound by such contract.¹ The position of an agent cannot be improved so as to give him the status of a principal by the mere fact of his being given extensive powers of being allowed to make contract in his name.² Thus, where the principal sends goods to his agent and consigns them to the railway but they are not delivered to the agent, the agent has *locus standi* to sue the railway for damages, for the railway receipt sent to him by the principal does not confer upon him the ownership of the goods³. Similarly, a broker who enters into a contract for and on behalf of his principal is not entitled to sue upon the contract even though the principal be disclosed, the ground being that the broker has expressly contracted as a broker⁴. So also, the secretary of a non-proprietary club cannot sue to recover the price of goods supplied to one of its members and if the money is not due on a contract made with him, an arrangement that he should sue cannot be recognised as giving a right of action⁵.

It may be stated as a general rule that ordinarily an agent contracting in the name of his principal and not in his own name is not entitled to sue, nor can he be sued on such contracts. "Where in making a contract no credit is given to himself as agent, but credit is exclusively given to his principal, he is not personally liable thereon⁶." The rule applies although the agent knows that the contract is one that he has no authority to make on behalf of the principal, and makes it fraudulently. Even in that case he cannot be sued on the contract if it is professedly made by him merely in his capacity as agent⁷.

**Contract to
the contrary.**

Whether an agent, apart from the cases specially mentioned, is to be taken to have contracted personally, or merely on behalf of the principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circum-

1 *Maulavi Hamid v. Shahzad Khan*, 52 I C 177

2 *Durga v. Cawnpore Flour Mills*, 1929 Oudh 417

3 *Maula Baksh v. Secretary of State*, 1929 Lah. 590

4 *Nanda Lal v. Gurupada*, 51 Cal 588—1924 Cal 733

5 *Michael v. Brigg*, 11 Mad 362.

6 *Story on Agency*, § 261, 263, 271, 391

7 *Lewis v. Nicholson* (1852) 18 Q. B. 503; *Jenkins v. Hutchinson* (1849) 18 Q. B. 741 But he may be sued for compensation under S. 235 of the Contract Act, or in an action of deceit.

standards. In the case of oral contracts the question is purely one of fact. If the contract is in writing, the presumed intention is that which appears from the terms of the written agreement as a whole¹. Where in an agreement to grant a lease, the agent was described as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he (the agent) would execute the lease, it was held that he had contracted personally although the premises belonged to the principal². A contract in the following form: "We the undersigned, three of the directors, agree to repay 500 l. advanced to the company." was held to be a personal contract on the part of the directors³. On the other hand, a contract in the terms "I undertake on behalf of A (the principal) to pay, etc." signed by the agent, was held not to involve personal liability⁴. A broker selling expressly on account of a known principal will not be liable to him for the price, although the buyer is undisclosed and described in the sold note as "my principal."

An agent who signs a contract in his own name without qualification, though known to be an agent is understood to contract personally, unless a contrary intention plainly appears from the body of the instrument⁵, and the mere description of him as an agent, whether as part of the signature or in the body of the contract, is not sufficient indication of a contrary intention to discharge him from the liability incurred by reason of the unqualified signature⁶. On the other hand, if words are added to the signature indicating that he signs "as an agent", or on account or behalf of the principal, he is considered not to contract personally, unless it plainly appears from the body of the contract, notwithstanding the qualified signature, that he intended to make himself a party¹⁰. The subject will be dealt with in detail in next chapter.

An agent can sue on a contract entered into by him on behalf of his principal if there is a contract to that effect, or if such a contract is presumed to exist in the circumstances mentioned in section 230 of the Contract Act, *e. g.* the existence of an undisclosed principal¹¹. But the presumption which arises

- 1 See Bowstead, on Agency 9th Edn, pp. 314, Seq. The course of business between the principal and agent may lead to the inference that the agent has made himself personally liable. *Walter Smith v Ahmed Abdeenbhuy*, A I R 1935 P C. 154=167 I. C. 9.
- 2 *Lakeman v. Mountstephen* (1874) L R 7 H L 17; *Jones v. Littledale* (1897) 1 N & P. 677, *Long v. Millar* (1879) 4 C P D. 650, *Williamson v. Barton* (1862) 7 H. & N. 899.
- 3 *Spttle v. Lavender* (1821) 5 Moo 270 C P.
- 4 *Norton v. Herron* (1825) 1 C & P. 648, *Tanner v. Christian* (1855) 4 E. & B 591.
- 5 *Mc Collin v. Gilpin* (1881) 6 Q B. D. 516.
- 6 *Downman v. Williams* (1845) 7 Q B 103.
- 7 *Southwell v. Bowditch* (1876) 1 C. P D 574.
- 8 *Higgins v. Senior* (1841) 8 M. & W 834, *Fairlie v. Feinton* (1870) L. R. 5 Ex. 169, *Dutton v. Marsh* (1871) L. R 6 C P 361.
- 9 *Hough v. Manzanares* (1879) 4 Ex. D 104, *Hutchinson v. Easton* (1884) 13 Q. B D. 861.
- 10 *Deslandes v. Gregory* (1860) 30 L. J. Q B 36, *Redpath v. Wigg* (1866) L. R. 1 Ex. 335.
- 11 See *Ramji v. Jankidas*, 39 Cal 802= 17 I C. 978.

under this section only arises when the agent is acting for a principal¹.

Joint Hindu family.

Although the plaintiff might be a member of an undivided Hindu family, still if a contract is entered into with him in his individual capacity and there is nothing on the face of it to show that he was acting on behalf of the family, he was entitled to sue alone². But where a contract is entered into on behalf of a joint family business by the managing members of the firm in their own names it is not necessary that any members of the joint family, other than those who entered into the contract should be made plaintiffs in a suit brought thereon: the managing members are in the position of agents for undisclosed principal³. On the principle of the section, one of two partners with whom a contract has been personally made may sue to recover money due to the firm on accounts⁴.

Agency coupled with interest.

It is also settled law that when an agent "has made a contract in the subject-matter of which he has a special property he may, even though he contracted for an avowed principal, sue in his own name."⁵ Such is the case of a factor⁶, and of an auctioneer, who "has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or a shopman," and a special property by reason of his lien⁷. Conversely, the auctioneer may be liable to the buyer for neglect to deliver the goods⁸ or to an outstanding true owner for conversion⁹, and if the sale has been advertised as being without reserve, the auctioneer is deemed to impliedly contract to accept the offer of the highest *bona fide* bidder and is liable to him in damages if he accepts a bid from the vendor¹⁰.

The Indian Courts also have laid down the like rule. "Where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name,"¹¹ even though his representative character may have been declared at the time of the contract¹². But there must be privity of contract between the plaintiff and the defendant. Unless the contract for the breach of which the action is brought is one made by the agent, he has no cause of action because there is no privity between him and the defendant¹³. Thus an auctioneer has an interest in the goods entrusted to him for auction sale. He has

1. *Gubby v Aveton*, 17 Cal 449

2. *Jugabhai v Rustumji*, 9 Bom. 811.

3. *Gopal v Badri*, 27 All. 361, *Bungee v Snodist*, 7 Cal 739

4. *Kapoorji v Pannaji*, 1929 Bom 177=113 J C 341, *Agacio v Forbes*, 14 Moo P C. 160

5. 2 Sm. L. O. 378 (19th Edn.)

6. *Snee v Prescott* (1743) 1 Atk 248, *Fisher v Marsh* (1865) 6 B & S. 411,

7. *Williams v Millington* (1788) 1 H Bl. 81.

8. *Woolfe v Horns*. (1877) 2 Q B D 355.

9. *Consolidated Co v. Curtis & Son* (1892) 1 Q B 495.

10. *Warlow v. Harrison* (1858) 1 E. & E 295, *Heatley v. Newton* (1881) 19 Qb. D. 326.

11. *Subrahmanya v. Narayanan* (1900) 24 Mad. 130, *Hardayal v. Kishan Gopal*, A. I. R. 1938 Lah. 673=178 I C. 939; *Coorla Spinning & Weaving Mills, v. Yallahdas*, 1925 Bom. 547; *Daya Prasad v. Cawnpore F. Mills*, 1929 Oudh 417.

12. *Durga v. Cawnpore Flour Mills*, 1929 Oudh 417.

13. *Subrahmanya v. Narayanan*, 24 Mad. 130.

a lien upon them for his charges and advances. He can, therefore, sue in his own name for the value of goods sold at an auction sale¹.

Whenever an agent has entered into contract in such terms as to be personally liable, he has a corresponding right to sue thereon² and this right is not affected by his principal's renunciation of the contract³. Policy brokers also are entitled by custom to sue in their own names on all policies effected by them⁴. But the mere fact that an agent is acting under a *del credere* commission does not give him the right to personally enforce a contract which he is not otherwise entitled to enforce⁵.

An agent may in his own name sue for the recovery of money paid on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or other wrongful acts of the payee, or otherwise under circumstances rendering the payee liable to repay the money⁶.

Right of agent to sue for money paid by mistake, etc.

A contract to be personally bound has to be presumed to exist where the contract is made by an agent for the sale and purchase of goods for a merchant resident abroad⁷. This is based on convenience and general mercantile usage. In the case of a British merchant buying for a foreigner, "according to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner", for "a foreigner constituent does not give the commission merchant any authority to pledge his credit to those" with whom the commissioner deals on his account⁸. Here, unless a contrary agreement appears, the foreign principal is not a party to the contract at all, and can neither sue⁹ nor be sued¹¹ on it. The question was originally one of fact, but at this day doubts in particular cases are reducible to a question whether, on the construction of the contract with regard to the facts, there does appear an intention that the principal shall be a party.

Presumed exceptions. Foreign principal.

On the question whether an agent is to be considered as having contracted personally the true intention has to be deduced as in other cases, from the terms of the contract and surrounding circumstances. The circumstances that the principal is a foreigner gives rise to a presumption, but only a presumption, of an in-

1 K P Kharas v Bawanji A I R 1926 Sind 6—92 I C 994

2 Cooke v Wilson (1856) 1 C B N S 151, Agnew v Forbes (1861) 14 Moo PC 160, Robertson v Watt (1853) 8 Ex 299

3 Short v Spackman (1831) 2 B & Ad 962 (broker who had bought goods in his own name, held entitled to recover damages for non delivery though the principal, with the broker's acquiescence had renounced the contract)

4 Principal Insurance Co v Leduco (1874) L R 6 P C 224, Oom v Bruce (1810) 12 East, 225, Kensington v Inglis (1807) 8 East 273

5 Bramwell v Spiller (1870) 21 L T 672

6 Stevenson v Mortimer (1778) Cowp 805 Holt v Elly (1859) 1 E & B 795, Colonial Bank v Exchange Bank (1885) 11 App Cas 84

7 See S 230 Indian Contract Act, 1872 See also *form of Deekhi Nandan v. Bamlal*, A I R 1923 Lah 296—73 I C, 885

8 Thomson v Darnley (1829) 9 R & C at p 87

9 Aitrong v Stokes (1872) L R 7 Q B 598, 605, *Cur per Blackburn J.*

10 Elbinger & G v Clays (1878) L R 8 Q B 473.

11 Hutton v. Bullock (1874) L R 9 Q B 572.

tention to contract personally and the presumption may be rebutted by indication of an intention to the contrary.¹ Where an agent was described as contracting "on behalf of" a foreign principal, who was named, it was held that the agent was not personally liable though he signed the contract in his own name², and a similar decision was come to where the contract note described the agents as having sold "on account of" certain foreign principals³, and where signature "as agents" was combined with description of the principal parties as "seller" and "buyer".

The residence referred to is the place where the principal administrative business of the company is carried on and not the place where the manufacture or other business operations are carried on. A company having its registered office in England, but carrying on business in India, will be deemed to be resident in England for the purposes of this section. Where a contract, therefore, is entered into by the "managing agents" of such company in India, it can be enforced against the agents personally, unless the foreign company is in writing made the contracting party, and the contract is made directly in its name⁴. Where the plaintiff entered into a contract directly with the foreign merchant, the defendant only acting as a part officer in the matter, the latter is not personally liable under the contract⁵.

The plaintiff who ordered certain goods through the defendants who were trading as merchants and commission agents in Bombay under a certain style being a branch of French firm trading in Paris who were the agents of the manufacturers cannot hold the defendants responsible for failure to perform the contract as they only constituted themselves the plaintiff's agent to 'place', i. e. to effect a contract with the manufacturers of the goods⁶.

An agent of a foreign state is personally liable for the contract entered into on behalf of his principal when the contracts are such as do not come under section 86 C. P. C. and permission need not be applied for.⁷

Principal undisclosed.

As already noticed, under S. 230 of the Contract Act, in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them. Such a contract, however, is presumed to exist where the agent does not disclose the name of his principal. The term "undisclosed principal is not defined" by the Act, though Bowstead defines it as

1. See the authorities critically reviewed in *Miller, Gibb & Co. v. Smith & Tyron* (1917) 2 K B 141, O. A., where some doubt was thrown on the continuing validity of the usage under modern conditions; at all events it is excluded when the terms of the contract make the foreign principal liable
2. *Opden v. Hall* (1879) 40 L. T. 751.
3. *Good v. Houghton* (1876) 1 Ex. D. 357, C. A.
4. See note 1 above.
5. *Tutika Basavaraju v. Parry & Co.*, (1908) 27 Mad. 315.
6. *Firm of Dohi Nandan v. Ramkal*, 1923 Lab. 296.
7. *Mahomedally Ibrahim v. Schiller*, 18 Bom. 470.
8. *Ram Chand v. Ismail*, A. I. R. 1923 Sind 189=113 I. O. 845.

meaning 'a principal who is not known to be such by the person dealing with an agent.' This, however, does not seem to be sufficiently comprehensive. It is usually the interest as well as the duty of the agent, in his contractual dealing with third persons, to fully disclose his representative character and to make all contracts in the name of his principal. Intentionally or unintentionally, however, he may fail to make this disclosure and may either conceal the fact of his agency altogether, or though he discloses that he is an agent, may conceal the name and identity of his principal. In the former case since no one else is named or suggested who may be liable, the agent as ostensible principal is liable in the same manner and to the same extent as though he were the real principal in interest. In the latter case, however, there being a possibility for the parties to the contract to stipulate as to the sole liability of the unnamed principal or the agent, the case may become different by such stipulation but in the absence of such stipulation either by the agent or the other contracting party the agent, according to the above rule, is liable in the same manner and to the same extent as in the former case. In either of these cases the principal is undisclosed though Bowstead's definition covers only the first case.

"Disclosure" means to make known. But if the other party knows that the agent is contracting as such, the presumption laid down in this clause does not arise, although at the time of making the contract the agent does not disclose the name of the principal, the knowledge being in such a case equivalent to disclosure¹. If the name of the principal is already known to the other party to the contract who also knows that he is dealing with the agent as an agent, a mere formal disclosure is unnecessary². In *Kapuri v. Pannaji*³ however, it was held that a principal cannot be said to disclose himself if the other party gets knowledge about him not from the principal himself but from some other source. When, however, an agent brings the principal, the vendor, face to face with the purchaser, it cannot be said that he did not disclose the name of the principal and so the presumption referred to above will not arise. But if the purchaser does not keep a record of the seller's names and his account books show that he used to make payments to the broker, the broker shall be deemed to be intended under the contract to have the right to sue the purchaser personally for the price of the goods sold⁴.

Thus, the secretary of a club cannot be sued personally for work done for the club, unless he has pledged his personal credit⁵. And similarly he cannot sue a member on behalf of the

1. Page 1.

2. *Mackinnon v. Lang* (1881) 5 Bom 584.

3. *Lyallpur Sugar Co. v. Mul Raj*, 65 I O 478 (Lah.).

4. 1929 Bom. 177=118 I C. 341; *Mackinnon v. Lang*, 5 Bom. 584 Diss. from; *Lakshminas v. Anna*, 32 Bom 856 rel. on.

5. *P. P. Deo v. Narayan*, 1929 Nag 170=116 I. O. 669.

6. *North Western Provinces Club v Sadullah* (1898) 20 All. 497; *Kemner Ransor v. Hobbert*, 15 P. R. 1891.

club for goods supplied to him¹. But the presumption that an agent is personally bound by a contract when the name of the principal is not disclosed may be rebutted, and where the contract is in writing, the whole of the contract is for that purpose to be examined². The mere fact, however, that the agent has signed himself as such will not rebut the presumption of personal liability³. But if the agent appears, on the face of the written contract, to be liable personally, he will not be allowed to adduce oral evidence to show that he did not contract in his personal capacity⁴.

Where the usual presumption is negatived by an agent contracting for an unnamed principal in such terms as to exclude his own liability, he may nevertheless show afterwards, if the fact be so, that he is himself the principal⁵, or the other party on discovering that fact may sue him⁶.

An agent who conducts transactions on behalf of the principal sometimes not disclosing the latter's name is entitled to sue in respect of any of those transactions and subsequently hand over the benefit to the principal⁷.

Where an ancestral business is carried on by some only of the members of a joint Hindu family as managers, a contract made by the managers in their own may be enforced by them personally with out joining the other members as parties to the suit. The managing members are in such a case in the position of undisclosed partners⁸.

It has been held in *Mahomedally v. Schiller*⁹ that a merchant in this country who orders goods through a firm of commission agents in Europe cannot hold the firm liable for failure to deliver the goods. The firm is in such a case merely an agent to place the merchant's order with the manufacturers in Europe, and by so doing it does not enter into any contract with the merchant for sale on behalf of the manufacturers, and it cannot therefore be held liable as an agent acting on behalf of undisclosed principals. Section 230 of the Contract Act refers to contracts "entered into by him on behalf of his principal," and the

1. *Michael v. Briggs* (1890) 14 Mad. 362.

2. *Soopromontion Setty v. Helgers* (1879) 5 Cal. 71; *Mackinnon v. Lang* (1881) 5 Bom. 584; *Hassonbhoy v. Clapham* (1882) 7 Bom. 51, 65; *Deo v. Narayan*, 1929 Nag 170 (merely on facts).

3. *Gubbay v. Aveloom* (1890) 17 Cal. 449. See *Pater v. Gordon* (1872) 7 M. H. C. 82, 84, and *up. Hough v. Menzanos* (1879) 4 Ex. D. 104. In the case of negotiable instruments, however, it would seem that no presumption of the agent's personal liability could arise at all if he signs his name to the instrument as agent: *Negotiable Instruments Act*, 1881, s. 28.

4. *Soopromontion Setty v. Helgers* (1879) 5 Cal. 71. 79. See *Evidence Act*, 1872, s. 99.

5. *Schmalis v. Avery* (1851) 16 Q. B. 655; but see s. 236 of the Contract Act below.

6. *Carr v. Jackson* (1852) 7 Ex. 382.

7. *Gopal Das v. Hari Das* (1905) 27 All. 361.

8. (1889) 18 Bom. 470. The order to the defendants in this case was in the following form: "I hereby request you to instruct your agents to purchase for me (if possible), the undermentioned goods on my account and risk upon the terms stated below." The defendants' reply was that they had received an intimation from their home firm that the order had been placed. See also the *Bombay United Merchants Co. v. Doolubram* (1883) 12 Bom. 40, 42.

placing of the order does not amount to such a contract. The result is the same if the goods are ordered through a branch in this country of a firm of commission agents in another country.

A broker is an agent primarily to establish privity of contract between two parties. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business book and gives to each party a note of the transaction which as given to the seller is the sold note and as given to the buyer the bought note. *Prima facie* a broker is employed to find a buyer or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may, however, make himself a party to the contract of sale or purchase, for he can go beyond his position of a negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. Where he is merely an intermediary, he is not liable on the contract; but if he has entered into a contract of purchase or sale on behalf of his principal, the provisions of section 230 of the Contract Act will apply.¹ Thus, if the principal is undisclosed, and the note says "sold for you to my principals," i. e. I, your broker, have made a contract for my principal, the buyers, the broker is merely an intermediary, and he is not personally liable to his employer.² For the same reason he is not liable if the contract says "bought for you from my principal,"³ and the terms "sold by order and for account of G to selves for principal," the broker signing as broker, do not bind him personally, nor therefore entitle him to sue in his own name for failure to deliver.⁴ But the broker is personally liable if the contract says "bought of you for my principal", for here the contract is one of purchase by the broker on behalf of undisclosed principals.⁵ Where the "principal contract" form is employed the custom of accepting the incident of broker's responsibility obtains even though the names are in fact disclosed. The contract being on the face of it between the buyers and unnamed sellers and the language adopted accordingly, there is a good custom entitling the brokers to enforce the contract and an arbitration clause should be so taken as to include the brokers.⁶

Brokers.

The Contract Act is a general statute dealing with contracts. The Negotiable Instruments Act is a statute dealing with a particular form of contract and the law laid down for special cases must always overrule the provisions of a general character. Where a negotiable instrument is signed by a duly

Negotiable instruments.

1. *Patiram v. Kankanarrah Co.* (1915) 42 Cal. 1050=31 I. C. 607.
2. *Southwell v. Bouditch* (1876) L. R. 1 C. P. D. 874.
3. *Patiram v. Kankanarrah Co.* (1915) 42 Cal. 1050=31 I. C. 607.
4. *Nand Lal Roy v. Gurupadda Holdar*, 1924 Cal. 733=81 I. C. 721. *Sembie* a usage of the local market to treat brokers as principals is not admissible.
5. *Southwell v. Bouditch* (1876) L. R. 1 C. P. D. 874, at p. 379.
6. *Jitmal v. Ram Gopal*, 1928 Cal. 419=74 I. C. 278.
7. *Kwong H. L. Saw Mills v. C. A. M. A. L. Firm*, 1938 Bang. 181=144 I. C. 666.

authorised agent in the name of his principal, the latter may be rendered liable on the instrument'. But where the instrument is signed by the agent in his own name without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, he is liable personally except to those who induced him to sign upon the belief that the principal only would be held liable¹. Unless the executant of a pro-note clearly indicates therein either by an addition to his signature or otherwise that he executes it as agent of another or that he does not intend thereby to incur personal responsibility, he is liable personally on the pro-note according to S. 27 of the Negotiable Instruments Act². That is, an undisclosed principal cannot be sued on a negotiable instrument⁴.

The name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or back of the document so that the responsibility is made plain, and can be instantly recognised as the document passes from hand to hand. It is not sufficient that the name of the principal should be "in some way" disclosed; it must be disclosed in such way that on a fair interpretation of the instrument his name is the real name of the person liable on the bill. Sections 26, 27 and 28 of the Negotiable Instruments Act contain nothing inconsistent with the above principles, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or pro-note a person whose name properly appears as a party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. Where, therefore, a *hundi* was signed by a person with the words "Acting Superintendent of the Private Treasury of . . ." after his signature, it was held that the words signified the signatory's position and the signature was not in the form necessary for an agent signing on a principal's behalf⁵. Such would also be the case where the signature on a *hundi* was followed by the words "Managing Agents, L. A. & Co.", which were held to be description only and did not bind the L. A. & Co⁶. Likewise was the decision where the words "Agent and attorney to Dr. O. L. Moonshi," or "Common Manager of Kalna", appeared after the signature. These words were held to be descriptive merely⁷. Such was also the case where the body of the pro-note continued the description "I—the Editor and Managing Director, The Servant."¹⁰

Where a person purports to sign a pro-note as agent or under a power of attorney of another, he must sign *for and on*

1. Negotiable Instruments Act, 1881, S. 27

2. Ibid, S. 28.

3. *Konati Naicker v. Gopalo*, 38 Mad. 482

4. *Bakdas v. Tanabai*, 1929 Nag 274=118 I. C. 673.

5. *Sadasuk v. Kishan Pershad*, 46 I. A. 83=46 Cal. 663.

6. *Sreelal Mangutlal v. L. A. Dressing Co., Ltd.*, 1925 Cal. 1062=89 I. C. 828.

7. *Dhirendra v. Nuthakary*, 37 C. W. N. 296.

8. *Brindaban v. Atul Krishna*, 40 C. W. N. 93=164 I. C. 728.

9. *Sitaram v. Charindas*, 1928 Bom 516=52 Bom. 646.

10. *Shyam Sundar v. Tatyahdr Paper Mills Co.*, 106 I. C. 848=33 C. W. N. 125.

held that person to make his principal liable. When he signs simply as agent and attorney to another, such words may be regarded as merely descriptive and he would be personally liable on the note¹.

No exception is made with regard to trading firm. A member of a trading firm executed a pro-note. Nowhere in it was the name of the firm mentioned. Held, that the firm was not liable².

When a *karta* of a joint Hindu family borrows money on a pro-note for the purposes of the family or for meeting family necessities, the creditor can recover the money from all the members of the joint family although they were not parties to the note³. And it has been held by the Privy Council that if at a time a person is *karta* of a Hindu joint family, it be necessary for the proper conduct of the joint family business that money should be borrowed from time to time on pro-notes, it would be within the authority of the *karta* to borrow money in his own name for the purposes of the family business. The other members may be made liable on the pro-note, though the note being signed in his own name, no presumption arises from the state of facts that the borrowing was for the family business which must be proved by the evidence⁴. But the liability of the other coparceners in such a case does not rest on any principles of agency, but upon the personal law to which the parties are subject⁵. In this case it was held that the payee may sue not only the maker but his coparceners, provided the plaint includes a demand in respect of the original debt, and the debt was contracted for the benefit of the family.

Promissory note executed by the *karta* of a joint Hindu family.

Any liability to which the minor would be subject under the Hindu law is not the less a liability because it was incurred by his guardian on his behalf. Therefore the minor would be liable on a pro-note executed by the mother in the body of which the minor was described as the maker though the mother did not sign as guardian at the end. That the transaction was for the benefit of the minor or some such other fact must, however, be proved⁶.

Pro-note executed by guardian.

It was held that the holder of a pro-note, though merely a *benamidar*, can maintain a suit thereon and a suit by the true owner is not maintainable even if the holder be a party thereto and he admits that he is merely a *benamidar* of the plaintiff. The true owner may, however, bring a suit on the consideration⁷. But these latter observations were considered to be *obiter* in a

Benamidar pro-note holder.

1 *Dharendra v Nutbehary* 37 O W N 296, *Sadaruk v Kishan Parshad and Sitaram v Churindas*, supra

2 *Kwong H L Suw Mills v C Firm*, 1933 Rang 131

3 *Sukhada Kanta v Jogini Kanta*, 61 I A 90

4 *Abdul Majid v Saravattibai*, 1934 P C 4=147 I C 1 In *Ram Gopal v Dharendra Nath*, 1927 Cal 376 (doubting and not following *Krishna Ayyar v Krishna Sami*, 23 Mad 597) it was held that the other members would only be bound if the name of each of them appears on the instrument itself, and is disclosed in such way that on any fair interpretation of document his name is the real name of the person liable upon the bill

5 *Krishna v Krishnasami* (1900) 23 Mad 597, at p 600

6 *Satyenarayana v. Mallaya*, 1935 Mad 447.

7 *Sikrieto v. Sitanath*, 1937 Cal 703=41 C W N 1283

later case where it was held that a suit by the true owner though based on original consideration, is not maintainable so long as the maker of the note remains liable to the *benamidar* who is the holder thereof.

Principal not
liable.

There is a class of cases in which agreements have been entered into by promoters on behalf of companies intended to be, but in fact not yet, incorporated. In such a case the alleged principal has no legal existence, and the agent is held to have contracted on his own account in order that there may not be a total failure of remedy². Other cases have occurred where the principals were uncertain bodies of persons, or otherwise incapable of being sued by the description in the contract, but as observed by Pollock and Mulla³, these would hardly be instructive in the different circumstances of Indian society, and it must be remembered that decisions turning on or involving the "solemnity" of an English deed are to be used here with great caution.

Deed execu-
ted in agent's
name.

According to English law, no person who is not a party to a deed can be sued upon the contract contained in it. But it seems that the technical rule of English law has no operation in this country, so that the principal may sue and be sued upon a deed even though it may not have been executed in his name⁴.

Sovereign
States as
principals.

Sovereign States and their rulers would seem to come within the description of possible principals who cannot be sued; but there is a special rule for this case, and it is settled, for sufficient reasons of good sense and policy, that an agent contracting even in his own name on behalf of Government is not to be considered as personally a party to the contract. One man would accept public office at such risk as a different rule would involve⁵. As regards British India, the law is that the Ruling Chief of an Indian State may be sued in a competent court in India in certain cases with the consent of the Central Government⁶. Where no such consent is given, it has been held that a suit may be brought against the agent appointed by the Ruling Chief of an Indian State for the purposes of the business, in respect of which the suit is brought⁷.

Defendant's
right where
agent sues
in his own
name.

It has been held that where an agent sues in his own name on a contract made on the principal's behalf, statements made by the principal, as well as his own statements, may be used in evidence against him as admissions⁸, and the defendant is entitled to avail himself of any defence, including that of

1. *Srinivasa v. Sitanath*, 1937 Cal. 758—41 C. W. N. 1283.
2. *Keiner v. Barter* (1866) L. R. 2 C. P. 174; *Re Empress Engineering Co.* (1880) 16 Ch. D. 125; *Lakshminahankar v. Motiram* (1904) 6 Bom. L. R. 1106.
3. *Indian Contract & Specific Relief Acts*, 7th Edn., p. 610.
4. *Chinnaramanaya v. Padmanabha* (1856) 19 Mad. 471 dissenting from *Raghunathdas v. Merarji* (1892) 16 Bom. 568.
5. *Gidley v. Lord Palmerston* (1822) 3 Brod & B. 276; See this and other authorities collected in *Palmer v. Hutchinson*, (1881) 6 App. Cas. at p. 628, *Grant v. Secy of State for India*, (1877) 2 C. P. D. 445, at p. 461. See Pollock & Mulla, p. 611.
6. See S. 86, Civil Procedure Code, 1908.
7. *Abdul Ali v. Goldstein* 48 P. R. 1910.
8. *Smith v. Lyon* (1813) 8 Camp. 465.

set-off which would have been available against the agent if he had been suing on a contract made on his own behalf, even though the defence would not have been available in an action by the principal on the contract¹. The defendant is also entitled to discovery to the same extent as if the principal were a party to the proceedings².

As a general rule, the right of an agent to sue personally, on a contract made on the principal's behalf ceases on the intervention of the principal, and a settlement between the principal and the third party constitutes a good defence to an action by the agent³. But if the agent has a lien on the subject matter of the contract as against the principal, his right to sue has priority to the right of the principal as long as the claim secured by the lien remains unsatisfied⁴; and in such a case the defendant cannot in an action by the agent set up any settlement with or set off against the principal which would operate to the prejudice of the claim secured by the lien⁵, unless the agent is estopped by his conduct, or by the terms of the contract, from disputing the validity of the settlement or right of set-off⁶.

Effect of settlement with principal.

If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had against the agent if the agent had been principal.

Rights of parties to a contract made by agent not disclosed.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

(S. 231, *Indian Contract Act, 1872*.)

It is thus clear that when a contract is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it, the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the principal

¹ *Gibson v. Winter* (1838) 5 B & Ad 96 (in an action by a policy broker, a payment by way of set off was held a good defence, though it would not have been good payment as against the principal).

² *Willis v. Baddeley* (1893) 2 Q B 324.

³ *Atkinson v. Cotterworth* (1825) 3 B & C. 647, *Rogers v. Hadley*, (1868) 2 H. & C. 327.

⁴ *Drinkwater v. Goodwin* (1775) Cowp. 251 (sale by factor in his own name of goods on which he had a lien for advances).

⁵ *Atkins v. Amber* (1796) 2 Esp 493 (defendant not entitled, in action by broker for price of goods sold in own name on which he had made advances, to set off debt due from principal), *Robinson v. Rutter* (1855) 4 E. & B. 954 (action by auctioneer for price of goods sold, plea that defendant had paid the principal held bad); *Girdle v. Kenrick* (1870) L. R. 5 Q. B. 840 (action by auctioneer for price of goods sold, settlement with the principal which did not operate to the prejudice of the plaintiff held a good defence).

⁶ *Coppin v. Walker* (1816) 2 Marsh 497; *Coppin v. Craig* (1816) 2 Marsh 501 (in these cases an auctioneer, having sold goods which were described as the property of named principal, allowed purchasers to take the goods away without giving them back to the principal).

had been the contracting party¹. The first clause of the section refers to the general case and the rule is that the third party should have, as against the undisclosed principal, the same rights which he would have against the agent if the agent had been the principal. The second clause deals with the particular case where the principal discloses himself before the contract is completed. The second clause should be read as governed by the first clause².

When a railway receipt for goods consigned for transit is given in the name of a servant or agent, the real owner is entitled to sue for their value if the goods are lost³.

The High Court of Bombay is of opinion that the right of the third party to repudiate the contract under the second paragraph arises only where the principal himself makes the disclosure, and that it does not arise where the disclosure is made by some other person or the information reaches him from some other source⁴. The principle of this section is further developed in the special rules as to undisclosed or dormant partners; in such cases the real difficulty is often to know whether the acting partner was in fact acting on behalf of the firm (See S. 19 of the Indian Partnership Act, 1932).

The High Court of Calcutta has held that there is nothing in this section to debar a principal from proceeding against his agent under S. 211 of the Contract Act, if the facts of the case entitle him to do so. But where the result of the other contracting party to perform the contract is due to the agent of an undisclosed principal failing to pay the former his dues under his own separate contract with him, the proper section for the undisclosed principal to proceed is under S. 231 and not S. 211, and such principal is entitled to a decree only against the other contracting party and not against his agent⁵.

As the principal can take advantage of the contract⁶ made by the agent as his undisclosed principal subject to any right which the other contracting party may have as against the agent, allegation of fraud and misrepresentation made by the agent to the other party are relevant in a suit by the principal against his agent and the other party and should be decided⁷.

Performance
of contract
with agent
supposed to
be principal.

Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

1. *Ladhmal v. Chandumal*, A. I. R. 1931 Sind 4=130 L. C. 548.

2. *Lakshmandas v. Anna Lane*, 32 Bom. 356=6 Bom. L. R. 731.

3. *E. I. Ry. v. Firm of Baldea*, 92 I. C. 1007.

4. *Lakshmandas v. Lane* (1904) 32 Bom 356; the reference to *Karim Choudhkar v. Sundar Bora* (1896) 24 Cal. 207, at 1, 3 of p. 362 of the report is wrong; the correct reference should be *Grenon v. Lachmi Narayain* (1896) 24 Cal. 8, at p. 10. *Kapurji Magniram v. Pannaji Desichand* A. I. R. 1929 Bom. 1017=115 L. C. 341.

5. *Mukhmal v. Baskudaranjan*, A. I. R. 1934 Cal. 721=132 L. C. 33.

6. *Jagan Nath v. The Hoop & Co.*, 71 P. R. 1909.

ILLUSTRATION

A, who owes 500 rupees to B, sells 1,100 rupees' worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

(S. 232, *Indian Contract Act, 1872.*)

It is to be observed that there is practically no difference between S. 231 and S. 232 of the Act, except that S. 231 expresses the same matter more fully. In *Premji v. Madhooji*¹ Marriott J. said: "I do not think, S. 232 is a repetition of the first paragraph of S. 231. It is, I think, a qualification of the first portion of that paragraph which gives a principal a general right to enforce a contract entered into by his agent. S. 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party." It is submitted, however, that the ground is completely covered by the saving clause in the first paragraph of S. 231, and no further qualification is added by S. 232. In the case cited above it was contended that the object of S. 232 was to reproduce the law as supposed to be laid down in *Thomson v. Davenport*² and *Armstrong v. Stokes*³, namely, that the right of the other contracting party to hold the principal liable is subject to the qualification that the principal has not paid the agent, or that the state of accounts between the principal and agent has not been altered to the prejudice of the principal. But this contention did not prevail, and it was said that the only qualification imposed upon the rights of the other contracting party was that specified in S. 234. Almost at the same time, in fact, the Court of Appeal in England⁴, overruling, or refusing to accept literally, the wider dicta in *Thomson v. Davenport* and *Armstrong v. Stokes*, approved the more guarded judgment of Parke B. and the court of Exchequer in *Heald v. Kenworthy*⁵. "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect, is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be unjust for him to do so. But I think that there is no case of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position." Otherwise, "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment unless the agent pays it accordingly."⁶

On similar grounds, if the principal represents the agent as principal he is bound by that representation. So if he stands

1. (1880) 4 Bom. 447, 456.

2. (1829) 9 B. & C. 78.

3. (1873) L. R. 7 Q. B. 598.

4. *Irvine v. Watson* (1880) 5 Q. B. D. 414, 417.

5. (1885) 10 Ex. 739, 746.

6. See Pollock & Mulla, pp. 614, 615.

by and allows a third person innocently to treat with the agent as principal he cannot afterwards turn round and sue him in his own name¹.

Equities
between
agent and
third party.

An undisclosed principal coming in to sue on the contract made by the agent must take the contract, as the phrase goes, subject to all equities; that is, the third party may use against the principal any defence that would have availed him against the agent². "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal, and consequently he is to have the same right of set-off which he would have had against the agent³." "The law with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt is well established by *George v. Clagett*... That rule is founded on principles of common honesty. One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of it afterwards turning out that there was a concealed principal⁴."

It has been held that the application of the rule is limited to liquidated demands;⁵ but it "is not confined to the sale of goods. If A employs B as his agent to make any contract for him, or to receive money for him, and B makes a contract with C or employs C as his agent, if B is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C to be acting as an agent for any one, A cannot make a demand against C without the latter being entitled to stand in the same position as if B had in fact been a principal. If A has allowed his agent B to appear in the character of a principal he must take the consequences."⁶

In England it is not necessary for the third party who dealt with the agent as a principal to go beyond showing that he believed him to be a principal. Means of knowledge or "reason to suspect" appears to be material only as tending to negative the alleged belief⁷. The words of both Ss. 231 and 232, however, are quite clear on this point. But there must be actual belief that one is dealing with a principal. Ignorance or doubt whether the apparent principal is a principal or an agent is not enough; for the ground of the rule is that the agent has been allowed by his undisclosed principal to hold out himself as the principal, and the third party has dealt with him as such⁸.

1. *Ferrand v. Bischoffshein* (1858) 4 O. B. N. S. 710, 717. The decision shows that nothing less than positive misleading will do.

2. *George v. Clagett* (1797) T. R. 359; *Senis v. Bond* (1833) 5 B. & Ad. 389.

3. *Per Wills J. in Drewner v. Norwood*, 14 O. B. N. S. 574, at p. 589.

4. *Turner v. Thomas* (1871) L. R. 6 C. P. 610, at p. 619, per Wills J.

5. *Ibid.*

6. *Montagu v. Forwood* (1893) Q. B. 350, at p. 355, per Bowen, L. J. Here the defendants were employed by apparent principals, who were in fact agents for the plaintiffs, to collect a general average contribution from underwriters.

7. *Borries v. Imperial Ottoman Bank* (1873) L. R. 9 C. P. 38.

8. *Cooke v. Eschaly* (1887) 12 App. cas 271. The decision has been criticised, but, being in the House of Lords, is final. See *Fallock & Malle*, p. 616.

It is to be noted that the second paragraph of S. 231 is really a branch of the general rule that agreements involving personal considerations of skill, confidence, or the like are not assignable or transferable¹.

In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Right of
person deal-
ing with
agent per-
sonally liable.

ILLUSTRATION.

A enters into a contract with B to sell 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C or both, for the price of the cotton.

(S. 233, *Indian Contract Act, 1872*.)

The cases where an agent is personally liable, have already been dealt with. It is a recognized and accepted principle of English law that the liability of principal and agent is alternative and not joint². It has been considered whether or not section 233 of the Indian Contract Act represents a departure from this principle of English law. In *Kuttikrishnan Nair v. Appa Nair*³, Contts-Trotter C. J. held that, though the wording of the section was very unfortunate, it was intended to reproduce the English law: "I have come to the conclusion that what the section means is that the person dealing with the principal through the agent may at his selection sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; but I am quite clear on this point that the section can only be construed as meaning that he may sue both principal and agent in the alternative and that he cannot get judgment against both of them jointly for the amount sued for that would be to turn a liability which is clearly mutually exclusive into a joint liability. This is contrary to the view expressed in an earlier Bombay case⁴, where it was said that the section created a joint liability, and if the illustration only showed that the agent and principal might be joined in one suit, an illustration could not control the plain meaning of the section itself. A Division Bench in Madras⁵ have more recently dissented from Contts-Trotter C. J. in the case cited above, Leach C. J. observing: "There is no ambiguity in the language used in the section and I am unable to see anything unreasonable in the rule which it embodies. What would be the position if a suit is brought against the principal after judgment had been obtained against the agent in an earlier suit is another matter. but we are not called upon to consider that question here."

Suit against
principal and
agent jointly
or alternat-
ively.

Pollock and Mulla comment⁶ as follows:

"The criticism of the learned judges on the language of the section and of the illustration is certainly justified; and it may

1. See Pollock & Mulla, p 616

2. *Morel v. Westmoreland* (1904) A C 11, *Moore v. Flanagan* (1920) 1 K. B. 919.

3. A. I. R. 1926 Mad. 1218= 97 I. C. 475.

4. *Shri Lal Moti Lal v. Bhidichand*, (1917) 19 Bom L. R. 370=40 I. C. 194.

5. *Shamsuddin Ravuthai v. Shaw Wallace & Co.*, A. I. R. 1939 Mad. 520=184 I. C. 158.

6. Page 617.

well be that the framers of the Act did intend to reproduce existing English law. But it is difficult to give the wording of the section a meaning other than that which commended itself to Leach C J. and his brother judge in Madras. The section itself, whatever may be the case with the illustration, is concerned with substantive law only; Contts-Trotter C J seems to treat it as setting out the creditor's procedural rights. On this construction the creditor may hold either principal or agent as severally liable in the alternative, or at his option hold them jointly liable. If he elects to hold them jointly liable, he can sue them both; but if he elects to sue one only he must be deemed to have given up his rights against the other, since in that case the liability is alternative and not joint."

Creditor's election

A person who has made a contract with an agent may if and when he pleases, look directly to the principal, unless by the terms of the contract he has agreed not to do so, and that whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only, and not the less so in cases where the agent is personally liable, for the law which superadds the liability of the agent does not detract from the liability of the principal¹. A company is, therefore, liable for moneys advanced in the course of voluntary liquidation to the liquidator authorised by the company to borrow for the purposes of the winding up². And, upon the same principle, a loan made to the secretary, treasurer, and agent of a company authorised to raise moneys for the company may be recovered from the company³. If the person enters into a contract with another, believing him to be the principal in the transaction, though in fact that other is acting as an agent, but he subsequently discovers who the real principal is, even though he may first have been given credit to the party who subsequently turns out to be an agent, he may nevertheless, upon discovering who the principal is substitute him as his debtor⁴. Where an agent is personally liable for debt the creditor has the option to proceed either against the principal or the agent. Where it did not appear that in lending the money, the lender (who knew that the money was being borrowed on behalf of certain principals) booked exclusively to the agent for payment he could proceed to realise the money from the principals⁵. Where, by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally, with the agent to restore the amount or value of such money or property⁶.

But when once the creditor has elected to sue the agent, and sued him to judgment, he cannot afterwards bring a second

- 1 *Caldes v Dobell* (1871) L R 6 C P 486. The question was whether the circumstances showed an election to charge the agent exclusively.
- 2 *In re Ganges Steam Car Co.*, (1891) 18 Cal 31.
- 3 *Purmannudass v Cormuck* (1881) 6 Bom 326.
- 4 *Bis Bhaddar v Sarju*, 9 A J 681, 688.
- 5 *Satya Priya v Gobinda Mohan*, 14 C W N 414.
- 6 *Morarji Pramsi v Mulji*, A 1 R 1924 Bom 232, *Rahim U'llah v Chunt Lal* A. I R 1937 Lah 570.

action against the principal, though the judgment against the agent may not have been satisfied¹, and though the creditor was not aware of the existence of a principal when he sued the agent². It was held in 1883 in a Madras case that where the suit against the agent is dismissed the creditor may subsequently bring a fresh suit against the principal, the reason given being that nothing short of a judgment against the agent could amount to a binding election on the part of the creditor to abandon the right to proceed against the principal³. This however is contrary to the later cases cited above and it is submitted that it is not good law in India⁴.

There may, however, be a deliberate intention shown from the beginning of the transaction, or at some later stage, to give credit to the agent alone. In that case there is no right of action against the principal⁵; and the third party must elect to sue an undisclosed principal, if he means to preserve his rights against him, within a reasonable time after ascertaining him⁶. The question whether the creditor has elected to give credit to him to the exclusion of the principal is one of fact⁷. 'Invoicing the goods to the agent and calling upon him to pay them', or taking and renewing his acceptances in payment of the price⁸, are not conclusive of such an election.

The English law on the subject is thus stated by Bowstead:¹⁰

"Where an agent enters into a contract in such terms that he is personally liable thereon, and a judgment is obtained against him on the contract, the judgment, although unsatisfied, is, so long as it subsists, a bar to any proceedings against the principal on the contract.

Where an agent enters into a contract in such terms that he is personally liable thereon, and the other contracting party, knowing who is the real principal, elects to give exclusive credit to the agent, he is irrevocably bound by his election, and cannot afterwards charge the principal on the contract, where such party, knowing who is the principal, sues and recovers judgment against the agent on the contract, he is conclusively deemed to have elected to give exclusive credit to the agent. Where he has not sued the agent to judgment, the question whether he has so elected or not is a question of fact, depending on the circumstances of the particular case.

- 1 *Shirlal Motilal v Bisdchand*, 19 Bom L R 370, *Bu Bhaddu v Sarju Pansd*, *Supra*.
- 2 *Shirlal Motilal v Bisdchand*, *supra*.
- 3 *Raman v. Vairavan* (1883) 7 Mad 392 citing *Curtis v Williamson* (1874) L R 10 Q B 57.
- 4 See Pollock & Mulla, p 618.
- 5 *Pateison v. Gandaseque* (1812) 15 East, 62, *Addison v Gandaseque* (1812) 4 Taunt 574.
- 6 *Smithurst v Mitchell* (1859) 1 F & F 622.
- 7 *Culder v Dobell* (1871) L R 6 Q P 486.
- 8 *Robinson v. Read* (1829) 9 B. & C. 449, *Whitwell v Perin* (1858) 4 Q. B. N. 5 412.
9. (1857) 7 E & B 301, in Ex. Ch. 8 E. & B. 647, see *Hasonphoy v. Clapham* (1882) 7 Bom 51, 66.
- 10 Art. 97, p. 285.

Except as in this article provided, the liability of the principal, whether disclosed or undisclosed, upon a contract made on his behalf, is not affected by the facts that the agent is personally liable on the contract and that credit was given to him by the other contracting party."

The question arises what constitutes election. It has been held that an election is a mere matter of choice and choice presupposes knowledge of the alternatives and freedom to choose between them, the other party cannot elect between the principal and the agent so long as he does not know that there was a principal in the transaction, or does not know who he was and this knowledge must include not only the fact of the agency, but also the name and identity of the principal. Whatever he does before such knowledge cannot be charged against him as an election. It seems to be everywhere agreed that the fact that the other party knows there is an undisclosed principal in existence does not charge him with the duty of then finding out who he is and giving the credit to him alone¹. The taking of an agent's promissory note or acceptance for the price of goods sold to him by one who knew he was acting as agent but who did not know for whom, will not conclude the seller from holding the principal also when subsequently discovered², nor will the fact that the vendor charged the goods to the agent³, or sent him a statement of account made out in his name⁴ supposing him to be the principal, prevent the vendor from subsequently charging the real principal when ascertained to be such⁵. It has been further held that the commencement of an action and even the recovery of a judgment against the agent before discovery of the principal is not a bar to an action against the principal when discovered, unless the principal has discharged the judgment against the agent or it has been satisfied⁶.

What is the position when the party comes to know both the existence and identity of the principal and is in a position to choose between the principal and the agent. It has been held that the mere presentation of a claim in an insolvency proceeding⁷ or the mere commencement of an action⁸ against the agent alone, even if after discovery of the existence and identity of the principal does not constitute election and does not bar a subsequent claim or action against the principal, whatever may be its effect when the principal is misled to his prejudice⁹. Where, however, such claim or action is prosecuted to a judgment against the agent, it amounts to an election as a matter of law and bars a claim or action against the principal¹⁰ although some cases have gone to the length of holding that nothing short of satisfaction of the judgment against the agent would

1. See Katlar, p. 659 and the authorities cited therein

2. *Merrill v. Kenyon*, 40 Am. Rep. 174.

3. *Yates v. Repetto*, 65 N. J. L. 294.

4. *Henderson v. Mayhew*, 41 Am. Dec. 434.

5. *Mechem*, § 1755

6. See Katlar, pp. 659, and 660 and the authorities cited therein.

7. *Cusick v. Williamson*, L. R. 10 Q. B. 57.

8. *Ferry v. Moore*, 18 Ill. App. 135

9. *Mechem*, § 1756—1758.

10. *Priestly v. Fernie*, 3 H. & C. 977, *Kendall v. Hamilton*, L. R. 4 App. cas. 564; *Keay v. Fenwick*, 1 C. P. D. 745 C. A.

release the principal from liability as a matter of law¹. Lord Chancellor Cairns, however, strongly deprecated the latter view and says: "I take it to be clear that where an agent contracts in his own name for an undisclosed principal, the person with whom he contracts may sue the agent, or he may sue the principal, but if he sues the agent and recovers judgment, he cannot afterwards sue the principal, even although the judgment does not result in satisfaction of the debt. If any authority for this proposition is needed, the case of *Priestly v. Fernie*, 3 H. & C. 977, may be mentioned. But the reasons, why this must be the case, are, I think obvious. It would be clearly contrary to every principle of justice that the creditor who had known and dealt with and given credit to the agent, should be driven to sue the principal if he does not wish to sue him, and, on the other hand it would be equally contrary to justice that the creditor on discovering the principal who really has had the benefit of the loan, should be prevented from suing him if he wishes to do so. But it would be no less contrary to justice that the creditor should be able to sue first the agent and then the principal, when there was no contract, and when it was never the intention of any of the parties that he should do so. Again, if an action were brought and judgment recovered against the agent, he, the agent would have a right of action for indemnity against his principal, while if the principal were liable also to be sued, he would be vexed with a double action. Further than this, if actions could be brought and judgments recovered first against the agent and afterwards against the principal, you would have two judgments in existence for the same debt or cause of action they might not necessarily be for the same amount, and there might be recoveries had, or liens and charges created, by means of both, and there would be no mode upon the face of the judgments, or by any means, short of a fresh proceeding, of showing that the two judgments were really for the same debt or cause of action; and that satisfaction of one was or would be satisfaction of both."²

As already pointed out³, the view held by the courts in India is that when once the creditor has elected to sue the agent, and sued him to judgment, he cannot afterwards bring a second action against the principal, though the judgment against the agent may not have been satisfied, and though the creditor was not aware of the existence of a principal when he sued the agent.

When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

(S 234, Indian Contract Act, 1872.)

See also notes under Chapter XII.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

1. See *Baynes v. Mansell*, 79 Pa. 298; *McLean v. Sexton*, 44 App. Div. 590; See per Contra also *Cherrington v. Buschell*, 147 App. Div. 16
2. Per Cairns L. C. in *Kendall v. Hamilton*, 4 A. C. 504.
3. See notes on page 540.

79. Rights of principal in respect of property intrusted to an agent.

Right to follow property into hands of third persons.

The English law on the subject is thus stated by Bowstead:¹ "Subject to the provisions of Articles 81, 83 to 87, and 89, where an agent disposes of the money or property of his principal in a manner not authorised by him, the principal is entitled as against the agent and third persons, to recover such money or property, wheresoever it may be found." Thus, where A authorises B, a stockbroker, to sell certain shares transferable only by deed, and intrusts him with the certificates and a blank transfer of the shares for that purpose, and B deposits the blank transfer and certificates with his banker as security for an advance to himself, the broker has no title to the shares as against A.² A, a solicitor, received rents as agent for his client, and paid them into his own bank to an account headed with the name of the estate. Subsequently, A's private account being overdrawn, he transferred the balance of the estate account. Held, that the banker, being aware that A was committing breach of trust, was liable to repay, to the principal the amount so transferred.³ Otherwise, if the banker had no notice that the moneys were trust moneys,⁴ or had not known that a breach of trust was being committed.⁵

Privilege from distress of goods and chattels in hands of agent

Again, under the English law where goods or chattels are intrusted to an agent, who carries on a trade or business in which the public are invited to intrust their goods or chattels to him, for the purpose of being sold or otherwise dealt with in the way of such trade or business, the goods or chattels, while on the premises of the agent, or on other premises hired by him, for any such purpose, are exempt from distress for rent.⁶ The rule does not extend to agents generally, but only to those, such as factors and auctioneers, who carry on a trade or business of a public nature;⁷ nor does the privilege attach to goods which at the time of distress are on premises neither occupied nor hired by the agent, though they may have been sent there to be dealt with in the ordinary course of his trade or business.⁸ Thus, where goods are intrusted to a factor or auctioneer for sale, they are not liable to distress for the rent at the premises of the factor or auctioneer.⁹ Where corn is intrusted to a factor for sale and not having a warehouse of his own, he deposits the corn in the warehouse of a granary keeper, the corn is privile-

1. Art. 111, p. 273.

2. *Fox v. Martin* (1895) 64 L. J. Ch. 173.

3. *Bodenham v. Hoskyns* (1862), 21 L. J. Ch. 864.

4. *Union Bank of Australia v. Murray Agnew*, (1898) A. C. 693. P. C.

5. *Shields v. Bank of Ireland*, (1901) 1 Ir. R. 222, *Bank of New South Wales v. Goulburn Valley Butter Factory* (1902) A. C. 543; See also *Lang v. Smyth* (1831) 7 Bing. 284; *Farguharson v. King* (1903) A. C. 825; *Colonial Bank v. Oddy* (1890) 15 App. Cas. 267; *Met. Ram Kuur v. Raghbir Singh*, (1930) 2 Lah. L. J. 518; *Karala Valley Tea Co., Lachminarayana*, A. I. R. 1939 Cal. 14—180 I. C. 141.

6. Bowstead, Art. 113, p. 278.

7. *Tupling v. Weston*, 1 C. & E. 99 (agent for the sale of the goods of two particular manufacturers only).

8. *Lyons v. Elliott* (1876) 1 Q. B. D. 210 (goods sent by A to be sold by auction together with B's goods on B's premises not privileged).

9. *Williams v. Holmes* (1859), 8 Ex. 861.

from distress for the rent of such warehouse'. Similarly, where an auctioneer hires a room for the purpose of a sale by auction, goods or chattels sent to the room for sale are privileged from distress, though the room was hired only for the particular occasion'. A employs an auctioneer to sell goods by auction on A's premises. B sends goods to A's premises to be sold with A's goods. The goods of both A and B are liable to distress for rent due from A in respect of the premises'. In *Tapling v. Weston*¹ A was an agent for the sale of carpets manufactured by B, and the name of B, as well as that of A, was painted outside the premises upon which A carried on business. A also acted as agent for the sale, upon the same premises, of carpets manufactured by C, and was entitled to carry on other agency business though he did not do so. Held, that the goods of B and C were not exempt from distress for the rent of the premises, because A did not carry on a trade or business in which the public were invited to intrust their goods to him.

See also the *Insolvency Act*, for rights as against agent's trustees in bankruptcy, and allied matters

80. Bribery of agent

Where an agent is induced by bribery to depart from his duty to his principal, the person who bribed the agent is liable, jointly and severally with the agent, to the principal for any loss incurred by him in consequence of the breach of duty, without taking into account the amount of the bribe or any part thereof that may have been recovered by the principal from the agent as money received to his use²

Rights of
principal
where agent
bribed

Every contract or act made or done by an agent under the influence of bribery, or (to the knowledge of the other contracting party) in violation of his duty to his principal, is voidable by the principal³

An agent who has been bribed is conclusively presumed to be influenced by the bribery in doing any act affecting the relations between his principal and the briber.⁴

Where A, having entered into a contract for the sale of a pair of horses to B, subject to a certificate of soundness from B's agent secretly offered the agent a certain sum if the horses were sold, and the agent, having accepted the offer, certified that they were sound, it was held that B was not bound by the contract, whether the agent was or was not influenced by the bribe⁵. Nor is it necessary that the bribery should have any direct relation to the particular transactions entered into by the agent voidable against the giver at the principal's option⁶. A broker who was employed to sell certain property sold it, ostensibly to A, really to A and himself. Both A and the broker became insolvent, the goods still being in the broker's possession. Held, that the contract was voidable, and that the

1. *Matthias v. Meenard* (1826), 2 C. & P. 353
2. *Hrown v. Arundell* (1850), 20 L. J. C. P. 90
3. *Lyons v. Elliott* (1876), 1 Q. B. D. 210
4. (1883), 1 C. & E. 90.
5. *Bowstead*, Art. 114, p. 279
6. *Shipway v. Broadwood* (1899) 1 Q. B. 369
7. *Smith v. Sorby* (1875), 3 Q. B. D. 522.

principal was entitled to recover the goods as against the broker's trustee in bankruptcy.¹

The principal may, if he thinks fit, affirm any contract which is voidable on the ground of bribery. In such case, and also where avoidance of the contract is impossible owing to his not having discovered the bribery soon enough, the principal is entitled to recover from the briber, as money had and received the amount given or promised as a bribe if ascertained;² or to sue him and the agent, who are liable jointly and severally, for any loss sustained by reason of having entered into the contract the damages being ascertained without reference to any sum which may have already been recovered from the agent as money received to the principal's use.³ In this case an agent contracted, on behalf of a corporation, for a supply of coals, the persons with whom he contracted making him an allowance of 1 s. per ton, and charging 1 s. per ton more than the market price, to enable them to make the allowance. The corporation on discovering the bribery, sued the persons who supplied the coals for the amount so overcharged. Held, that the defendants were liable, and that the fact that the agent had deposited with the corporation the amount of the bribe, and the corporation had agreed to allow him what was recovered from the defendants, constituted no defence.

An agent cannot maintain any action for the recovery of money promised to be given to him by way of a bribe, whether he was induced by the promise to depart from his duty to the principal or not.⁴ Such a promise, being founded on a corrupt consideration, cannot be enforced by law.

The rights of the principal against an agent in respect of bribes received in the course of the agency are already dealt with⁵ and may be referred to. The receipt of a bribe by an agent justifies his immediate dismissal without notice, although the contract of agency may provide for its continuance for a specified time.⁶

81. Rights and liabilities of the principal on contracts made by agent.

The Crown may sue, or may be sued by petition of right, on any contract duly made on its behalf by a public agent.⁷

Crown may sue or be sued on contracts made by public agent.

Principal may sue or be sued in his own name.

The general law in England on the subject is thus stated by Bowstead:⁸ "Every principal, whether disclosed or undisclosed, may sue or be sued in his own name on any contract duly made on his behalf, and in respect of any money paid or received by his agent on his behalf. Provided always that

1. *Ex. p. Hutch, re Pemberton*, (1840) 10 Mont & Ch. 667.

2. *Hovenden v. Millhoff* (1900) 83 L. T. 41.

3. *Salford (Mayor of) v. Laver* (1891) 1 Q. B. 168, *Grant v. Gold etc. Syndicate* (1900) 1 Q. B. 233.

4. *Harrington v. Victoria Dock Co.* (1878) 8 Q. B. D. 549.

5. See notes on p. 863.

6. *Boston Fishing Co. v. Ansell* (1888) 39 Ch. D. 339.

7. Bowstead, Art 90 p. 224. quoting *Thomas v. R.* (1874), L. R. 10 Q. B. 81.

8. Article 91. p. 224.

the right of the principal to sue and his liability to be sued, on a contract made by his agent, may be excluded by the terms of the contract.

Where an agent enters into a contract, verbal or written, in his own name, parol evidence is admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract, provided that such evidence is not inconsistent with the terms of a written contract.

The right and liability of a principal, whether disclosed or undisclosed to sue and be sued in his own name on a contract made on his behalf, are not affected by the circumstances that the contract is to be partly performed by the agent and that from the terms thereof the consideration appears to move from the agent alone; nor by the circumstances that the agent was acting as a *del credere agent*.

This article, so far as concerns undisclosed principals, does not apply to foreign principals, nor to deeds, bills of exchange promissory notes, or cheques."

Thus, where a factor, acting on behalf of his principal, sells goods in his own name, the principal may sue for the price.¹ But if an agent sells goods in his own name to a person who believes him to be the principal and who contracts with him for a reason personal to the agent, e. g. that the agent is the debtor of such person, the principal cannot sue upon the contract of sale.² Where a wife, who carried on a business on behalf of her husband upon premises of which she was the tenant and in respect of which she paid the rates, ordered goods for the business in her own name, it was held that the husband was liable for the price of the goods.³ A part-owner of a whaling vessel sold whaling oil in his own name. Held, that the owners were entitled to sue jointly for the price, though the purchaser did not know that any person besides the seller was interested.⁴ So, if three persons agree that one of them shall purchase goods in his own name in their joint behalf, they may jointly sue the vendor for breach of a contract made in pursuance of such agreement.⁵

An agent entered into a contract in his own name for the purchase of property, and paid a deposit. Held, that on the default of the vendor, the principal was entitled to sue in his own name for the return of the deposit.⁶ An auctioneer receives a deposit at a sale by auction. Though it is his duty to hold the deposit as a stakeholder, he is so far the agent of the vendor in receiving it, that the vendor is responsible to the purchaser in the event of a loss through the insolvency of the auctioneer.⁷

A signs and addresses a letter to B, undertaking to answer for a certain debt due from C, D being in fact the creditor. Parol evidence is admissible to prove that the letter was

1. *Sadler v. Leigh* ((1815), 4 Camp. 195
2. *Greer v. Downs Supply Co.*, (1927) 2 K B 28
3. *Petty v. Anderson* (1825), 8 Bing 170.
4. *Skinner v. Stocks* (1821), 4 B & Ald 437
5. *Coltney v. Fennell*, (1890), 10 B & C. 671
6. *Norfolk v. Worthy* (1808), 1 Camp 537
7. *Raine v. May*, (1854) 15 Beav. 613

addressed to B as D's agent, so as to enable D to sue A on the guarantee, though D is not named in the letter, and it was addressed to B as if B were the creditor.¹

These general principles will apply in India also, subject to the provisions of sections 230 to 234 of the Indian Contract Act, as noticed above.

Foreign
principals.

Bowstead states:²

"No foreign principal may sue or be sued on any contract made by a home agent, unless the agent had authority to establish privity of contract between the principal and the other contracting party, and it clearly appears from the terms of the contract, or from the surrounding circumstances, that it was the intention of the agent, and of the other contracting party to establish such privity of contract."

Compare the provisions of section 230 of the Indian Contract Act, 1872, cited at p.

Deeds.

Regarding deeds, it has been held under the English law, that no principal may sue or be sued on any deed, even if it be expressed to be executed on his behalf, unless he be described as a party thereto and it be executed in his name; but where an agent, who has entered into a deed in his own name, is a trustee for his principal of the rights under the deed, the principal may enforce such rights, in the name of the agent, in proceedings to which the agent is a party, as plaintiff or as defendant.³

See S. 102 of the Transfer of Property Act, 1882, regarding service or tender on or to agent.

Effect of
particular
customs or
usages.

Bowstead states:⁴

"Where an agent contracts in a particular market, the contract is deemed to be made subject to the rules, regulations, customs and usages of that market, so far as they are not inconsistent with the express terms of the contract. Provided, that the principal is not bound by any unreasonable rule, regulation, custom or usage, unless he had notice thereof and agreed to be bound thereby, at the time where he authorised the agent to make the contract. Provided also that the right of the principal whether disclosed or undisclosed, to sue in his own name, and his liability to be sued, on a contract made on his behalf, are not affected by the circumstance that it was made in a market, by the rules, regulations, customs or usages of which the agent is personally liable on the contract, and the contract is there regarded as that of the agent alone, whether such rules, regulations, customs or usages were known to the principal at the time when he authorised the agent to make the contract or not."

82. Other matters

Dealings with
money and
negotiable
securities.

Under the English law, where an agent, in consideration of an antecedent debt or liability, or for any other valuable con-

1. *Bateman v Phillips* (1812), 15 East. 272

2. Article 92, p. 228.

3. Bowstead, Art. 93, p. 228

4. Bowstead, Art. 96. p. 232

admission, pays or negotiates money or negotiable securities in his possession to a person who receives the same in good faith and without notice that the agent has not authority so to pay or negotiate the same, the payment or negotiation is as valid as if it had been expressly authorised by the owner of the money or securities.¹ A thing is deemed to be done in good faith within the meaning of this rule when it is in fact done honestly, whether it is done negligently or not.¹ A broker fraudulently pledged with a banker negotiable securities belonging to various principals, as security, *en bloc*, for an advance. The banker acted in good faith, but had no knowledge whether the securities were the property of the broker, or whether he had authority to pledge them, or not, and made no inquiries. Held, that the banker had a good title to the securities, as against the principals, to the extent of the advance.² Every person who takes negotiable securities for valuable consideration, and in good faith acquires a good title, although the person who negotiates them has no authority to do so.² An auctioneer, in the ordinary course of business and not in breach of trust, paid the proceeds of sales into his own account at a bank. The bankers retained the amounts so paid in for an overdraft of the auctioneer, and closed the account. Held, that the principal had no remedy against the bankers, although they had notice that the money was substantially the proceeds of sales. Otherwise, if the auctioneer had been guilty of a breach of trust in so paying in the money, and the bankers had been aware of that.³ So, a banker is entitled to set off what is due to a customer on one account against what is due from him on another, though the money so set off may be trust money, if the banker has no notice of the trust.⁴

Again, it has been held under the English law that where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor reasonably to believe that the agent has paid the debt or discharged the obligation, or that the creditor has elected to look to the agent alone for the payment or discharge thereof, and in consequence of such belief pays, or settles or otherwise deals to his prejudice with the agent, the creditor is not permitted to deny, as between himself and the principal, that the debt has been paid or the obligation discharged, or that he has elected to give exclusive credit to the agent so as to discharge the principal; but mere delay by the creditor in enforcing his claim, or in making application to the principal for payment of the debt or discharge of the obligation, is not sufficient inducement for this purpose, unless there are special circumstances rendering the delay misleading.⁵

Settlement between principal and agent affecting recourse to principal.

Where an agent buys goods in his own name from seller who believes him to be buying on his own account, and whilst

1. Bowstead, Art 85, p 214

2. *London Joint Stock Bank v Simmons* (1892) A C 201, *Mutton v Peat* (1900) 2 Ch 79, *Lloyds Bank v. Min Bankiers* (1913) 108 L T 143, C A.

3. *Murten v Rake* (1885), 53 L T 946

4. *Union Bank of Australia v Murray-Aynsley* (1898) A C 693, F C, *Bank of New South Wales v Goulburn Valley Butter Factory*, (1902) A. C. 548

5. Bowstead, Art. 98, p 239

the seller continues to give exclusive credit to the agent, believing him to be the principal and not knowing of any other person in the transaction, the principal in good faith pays the agent for the goods, the principal is discharged from liability to the seller¹.

Except as in this article provided, the principal, whether disclosed or undisclosed, is not discharged, nor is the right of recourse to him affected, by the circumstance that he has paid or settled or otherwise dealt to his prejudice with the agent². Thus on this principle, where a creditor takes a security from the agent of his debtor, and gives the agent a receipt for the debt, and the principal deals to his detriment with the agent on the faith of the receipt, the principal is discharged from liability to the creditor³. An agent of a debtor offers to pay the debt either in cash or by a bill of exchange. The creditor takes a bill in payment, and it is dishonoured. If the agent had funds of the principal's wherewith to pay the debt, or if the principal deal to his prejudice with the agent on the faith of his having paid it, the principal is discharged from liability to the creditor⁴. In *Mac Clure v. Schemel*,⁵ goods were sold, on the terms that they should be paid for in cash, to an agent who appeared to be buying on his own account. The seller omitted to enforce cash payment, and the principal, not knowing that the seller had not been paid, paid the agent for the goods. Held, that the principal was discharged.

The agent of a debtor paid the debt by means of his own cheque, and the creditor neglected to present the cheque for four weeks, when it was dishonoured, and the agent absconded. There was a reasonable chance that the cheque would have been honoured if it had been presented within three weeks, and the principal had dealt to his detriment with the agent on the faith of the payment. Held, that the principal was discharged.⁶

Fraud, misrepresentation, or knowledge of agent may be set up in an action by the principal.

It has also been held under the English law, that where a principal seeks to enforce a contract negotiated or made by his agent, the fraud, misrepresentation, non-disclosure or knowledge of either the principal or the agent may be set up by the other contracting party by way of defence, in the same manner, and with the same effect, as the fraud, misrepresentation, non-disclosure or knowledge of the principal might have been if he had himself negotiated or made the contract⁷. As an instance of it, a person is induced by the material misrepresentations of the directors to contract to take shares in a company. He is entitled to have the contract received, and his name removed from the register of shareholders, and to be repaid the amount paid for the shares⁸, provided that he takes steps for that purpose immediately he discovers the falsity of the

1. Bowstead, Art. 98, p. 239

2. *Wynttt v Hertford* (1802), 3 East 147.

3. *Smith v Ferrand* (1827), 7 B. & C. 19.

4. (1871), 20 W. R. 168

5. *Hopkins v Warr* (1869), L. R. 4 Ex. 268.

6. Bowstead, Art. 99, p. 241.

7. *Reese River Mining Co. v. Smith*, (1869), L. R. 4 H. L. 64.

representations, and before the commencement of the winding up of the company'. So, if a person be induced by the misrepresentations of an insurance agent to effect a policy, the insurance company is not entitled to retain the benefit of the contract, though it did not authorise the misrepresentations'. An agent who was employed to find a purchaser for certain property misrepresented certain facts bearing on the value of the property. Specific performance was refused'. So, where an agent in negotiating it on purchase of property, falsely denied that he was buying it on behalf of a certain person, with the knowledge that if he disclosed the fact the other party would not enter into the contract, the court refused to decree specific performance.⁴ But where the personal qualification of the real purchaser is immaterial, non-disclosure of his identity will not form a ground of defence to specific performance.⁵

A local agent of a bank lends money to an executor, who mortgages property of the testator to the banker as security for repayment. The executor, to the knowledge of the agent, intended to and does misapply the money. The mortgage is invalid, and the banker has no claim against the estate of the testator.⁶

An agent sent notes to his principal by carrier, and they were lost in transit. The carrier had given notice to the principal that he would not be liable for the loss of notes, but had not given any such notice to the agent. An action being brought by the principal in respect of the loss of the notes, it was held that the carrier was not liable.⁷

A partner sold goods which were packed, to his knowledge, for the purpose of smuggling. Held, that the firm were not entitled to recover the price of the goods, though the other partners were not aware of the illegal nature of the transaction.⁸

An agent of a firm of printers contracted with A for the printing of copies of manuscript which to the knowledge of both A and the agent, contained libellous matter. Held, that the printers were not entitled to recover the cost of work done under the contract, although they had no actual notice of the libellous nature of the manuscript, the knowledge of the agent being equivalent to their knowledge.⁹

Bowstead thus states the English law on the subject.¹⁰

"Every person who, in dealing with an agent, is led by the conduct of the principal to believe, and does in fact believe, that the agent is the principal in the transaction, is discharged from liability by payment to or settlement with the agent in any

Settlement with or set off against agent affecting rights of principal.

1. *Oakes v. Turquand* (1867), L R 2 H. L. 325
2. *Refuge Assurance Co v. Kettlenell*. (1909) A. C. 243, *Hughes v. Liverpool etc. Socy*, (1910) 2 K. B. 482
3. *Mellens v. Miller* (1882), 22 Ch. D. 194.
4. *Atcher v. Stone* (1898), 78 L. T. 34.
5. *New v. Dix* (1898), 78 L. T. 445; *Dyster v. Randall*, (1926) Ch. 932.
6. *Collinson v. Lister* (1855), 7 De G. M. & G. 634.
7. *Mayhew v. Eames* (1825), 3 B. & C. 601.
8. *Biggs v. Lawrence* (1789), 3 T. R. 454
9. *Apthorp v. Neville* (1907), 23 T. L. R. 575.
10. Article 100, p. 243.

manner which would have operated as a discharge if the agent had been the principal, to the same right of set-off in respect of any debt due from the agent personally as he would have been entitled to if the agent had been the principal; provided that he had not, at the time when the payment or settlement took place, or the set-off accrued, received actual notice that the agent was not in fact the principal.

Where a principal permits his agent to have the possession of goods, or if the documents of title thereto, he is deemed, for the purposes of this article, by his conduct to hold out the agent as the owner of the goods.

Where an agent, being duly authorised in that behalf, contracts in his own name in respect of goods upon which he has a lien as against the principal, the right of the principal to sue on the contract, during the time that the claim secured by the lien remains unsatisfied is subservient to that of the agent; and a payment to or settlement with the agent during that time operates as a discharge, not withstanding that the person making the payment or settlement has had notice from the principal or his trustee in bankruptcy not to pay or settle with the agent, and such payment or settlement may, to the extent of the claim secured by the lien of the agent, be by way of set-off or settlement of accounts between the agent and the person making the payment or settlement.

Except as in this article provided, the defendant in an action by the principal has no right to set-off any claim he may have against the agent personally, and the principal is not bound by a payment to or settlement with, the agent, unless such payment or settlement was made in the ordinary course of business, and in a manner actually or apparently authorised by him. Notwithstanding any special custom or usage, it is not deemed to be within the apparent scope of the authority of, any agent to receive payment on his principal's behalf by way of set-off or settlement of accounts between himself and the person making the payment."

A, the owner of certain goods, permits B to hold himself out as the owner thereof. B holds himself out as the owner to C, and C, believing him to be the owner, receives the goods in part payment of a debt owing by B. C is not liable to A for the price of the goods¹. If an owner of goods permit his agents to sell them as principal, the buyer is discharged by payment to the agent in any way which would have operated to discharge him if the agent had been the true owner.²

Right of
set-off

A factor sells goods in his own name, the buyer dealing with him as principal, and believing him to be selling his own goods. The buyer, in an action by the principal for the price of the goods, has a right to set off debt due to him from the factor personally, provided that the debt was incurred before he had received notice that the goods did not belong to the factor³.

1. *Ramazotti v. Bourving* (1859), 29 L. J. P. C. 30.

2. *Cootes v. Lomas* (1898), 1 Camp 445.

3. *Borries v. Imperial Ottoman Bank*, (1878), L. R. 9 C. P. 38.

A factor sells goods in his own name, the buyer knowing that he is selling them as factor, but not knowing who is the principal. The principal sues the buyer for the price. The buyer has no right to set off a debt due to him from the factor.¹ The circumstance that the factor sells under a *cui credere* commission does not affect this rule.²

A broker bought goods on behalf of A from a factor who sold them on behalf of B. The broker knew that the factor sold the goods on behalf of a principal, but A thought that he was selling his own goods. B sued A for the price. Held, that A was bound by the knowledge of broker, and therefore had no right to set off a debt due to him from the factor.³

A broker, who was intrusted by his principal with the possession of goods, sold them in his own name without disclosing the principal. The buyer knew that the broker sometimes sold goods in his own name, though acting as a broker, and sometimes sold goods of his own, and in this case had no particular belief one way or the other. Held, that the buyer was not entitled, in an action by the principal for the price, to set off a debt due from the broker personally.⁴ The right to set off as against the principal a debt due from the agent, is founded upon estoppel, and the buyer must show that he was led by conduct of the principal to believe, and did in fact believe, that the agent was acting as principal.⁴

An agent, with the consent of the owner, sold goods as principal. The agent afterwards became bankrupt and the principal sued the buyer for non-acceptance of the goods. Held, that the defendant was not entitled to set up, by way of defence, that there were mutual credits between the agent and himself resulting in a balance in his favour, because the mutual credits clause of the Bankruptcy Act (English) applies only as between the bankrupt and his creditors.⁵ In order to constitute a right of set-off as against the principal, each of the debts must be liquidated.⁶

A employed B to collect general average contributions under an insurance policy. B instructed a broker to collect the contributions, the broker believing him to be the principal. B became bankrupt. In an action by A against the broker for the contributions, as money received to his use, it was held that the broker was entitled to set off a debt due from B.⁶

A, who acted as shipping agent for B, a merchant in Havannah, consigned in his own name to C, a cargo of tobacco. C, according to his instructions, insured the cargo for the benefit of all concerned, having had notice that there was a principal. The cargo was lost, and the insurance money was paid to C after he had received notice that B claimed it. Held,

1. *Samson v. Brinsley*, (1855) 34 L. J. C. P. 161; *Cooper v. Strauss* (1898), 14 T. L. R. 233.

2. *Harndy v. Lacy* (1817), 6 M. & S. 156.

3. *Dremer v. Norwood* (1864), 34 L. J. C. P. 43.

4. *Cooke v. Eschellby* (1897), 12 App. Cas. 271.

5. *Turner v. Thomas* (1871), L. R. 6 C. P. 610.

6. *Montagu v. Forwood* (1898) 2 Q. B. 350, C. A.

that C was not entitled to set off, as against B, debts due to him from A personally.¹

Goods were consigned to an agent for sale. The agent pledged the goods to broker as security for specific advance, and authorised them to sell. The brokers sold the goods, but before receiving the proceeds had notice that the principal was the owner, and that he claimed the proceeds. Held, that the principal was entitled to the balance of the proceeds after deducting the amount of the advance, and that the brokers were not entitled to set off such balance against a general account due to them from the agent. Otherwise,² if they had received the proceeds in the *bona fide* belief that they belonged to the agent, and had credited the amount in the account with the agent before receiving notice of the principal's claim³.

Where the agent has a lien.

A factor, who has a lien on goods for advances, sells the goods in his own name. The buyer, though he knew that the factor was acting as an agent is to the extent of the factor's lien discharged by a payment to him, even if the payment is by way of set off,⁴ or is made after the bankruptcy of the principal, and after notice from the trustee in bankruptcy not to pay the factor.⁵

A factor, who has a lien on goods in excess of their value, sold the goods to A, to whom he was indebted. The factor became bankrupt. A gave credit for the price of the goods, and proved in the bankruptcy for the residue of his debts against the factor. Held, that this settlement was a good answer to an action by the principal against A for the price.⁶

A broker sells goods in the name of his principal to A, who pays the broker for them. The broker absconds without paying over the money to the principal. A is liable to the principal for the price of the goods, unless the broker had authority, or was held out by the principal as having authority, to receive, and the mere fact that the principal had on previous occasions authorised him to receive payment for goods sold on his behalf is not sufficient evidence of such authority or holding out.⁷

Payment to or settlement with agent.

An auctioneer sold goods by auction, the conditions providing that the deposit should be paid to him at once, and the balance of the purchase-money on or before delivery. The purchaser duly paid the deposit, and on delivery of the goods gave the auctioneer a bill of exchange for the balance. Before the bill matured, the principal revoked the auctioneer's authority to receive payment, and gave notice of the revocation to the purchaser. Held, that the purchaser was not discharged by the payment to the auctioneer, it not being shown that he was authorised, or that it was customary, to take bills

1. *Mildred v. Maspons* (1883), 8 App. Cas. 874.

2. *Kaltenbach v. Lewis*, (1885), 10 App. Cas. 617.

3. *Ibid*; *New Zealand and Australian Land Co v. Watson* (1891) 7 Q. B. D. 874.

4. *Warner v. M'Kay* (1896), 1 M. & W. 591.

5. *Drinkwater v. Goodwin* (1775), Cowp. 351.

6. *Hudson v. Granger* (1831), 5 B. & A. 27.

7. *Litck v. Jamieson* (1886), 2 T. L. R. 208, C. A.

of acceptance in payment.¹ A payment to an agent who is known to be such must be in cash in order to bind the principal, unless he authorised the agent or held him out as having authority, to receive payment in some other form.² But a custom in a particular business to receive payment by cheque is reasonable and binding.³

A was a traveller for a firm to whom B was indebted, and had authority to collect due to the firm. The firm wrote a letter to A saying: "We should like to draw for the amount." A showed the letter to B who thereupon accepted a bill drawn in blank and payable to "my order". A afterwards filled in his own name as drawer, and misappropriated the proceeds of the bill. Held, that the firm were not bound by the payment.⁴

An agent is authorised to sell certain goods and receive payment. He sells the goods, and the buyer, knowing that he is acting as an agent, pays him before the credit has expired, deducting discount. The agent does not pay over the money to the principal, and becomes bankrupt before payment is due. The principal is not bound by the payment, unless it be shown that it is customary in the ordinary course of the particular business to make payments before they are due, or that the agent had authority to receive payment otherwise than in accordance with the terms of the contract.⁵

The consideration of the liability of the principal for the criminal or penal acts of his agent involves two aspects—(a) the civil liability and (b) the criminal or penal liability.

Principal's liability for agent's criminal and penal acts.

The principal's civil liability for the agent's criminal or penal acts rests upon the same considerations and is, in many respects, of the same nature, as his liability for his agent's torts generally. The performance of an act as a crime, unless expressly directed or participated in by the principal, could really be deemed to be within the scope of the agent's authority, but in as much as most acts which are punished as crimes have also a side from which they may be regarded merely as torts, it may often happen that the same act which may from one standpoint be regarded and punished as a crime, may from another standpoint be regarded as a mere private tort; and if from this standpoint the act would impose liability upon the principal as an act done within the scope of the employment the fact that it might from another standpoint be treated and punished as a crime would not affect the result. This is still more clear in the cases in which the act would not ordinarily be regarded as criminal even though in the particular case it may be prohibited under a penalty. Whether the criminal intent is necessary to constitute the offence or not, is altogether immaterial in such cases. In either case if the act also amounts to a tort the principal is civilly liable.

1. *Williams v Evans* (1866), L. R. 1 Q. B. 352.

2. *Sykes v. Giles* (1839), 5 M. & W. 645.

3. *Bridges v. Garrett* (1870), L. R. 5 C. P. 451. Such a custom must be proved.

4. *Hogarth v. Wharley* (1875), L. R. 10 C. P. 686.

5. *Catterall v. Hindle* (1867), L. R. 2 C. P. 368.

This rule also extends to penal acts which are innocent in themselves, but which being the subject of statutory prohibition based upon the police power of the state, are treated as punishable by the state. In such cases so far as the forbident act can be regarded as a mere statutory tort or the penalty prescribed is regarded as damages, a civil action may be maintained against the principal.¹

**Criminal
Liability.**

In considering the criminal liability of the principal for the acts of the agent a distinction is made between the acts which are criminal and the acts which are penal, and different rules prevail. In a case where the act of the agent is criminal the principal is not liable unless the act is committed with his knowledge and consent.² Where, however, the act is not criminal in itself but only made penal by some statutory prohibition, the principal is liable although the act was done without his knowledge and consent.³ Whatever in such cases a servant does in the course of his employment with which he is entrusted and as a part of it is the master's act.⁴ The master or the principal, by entrusting to the servant or agent the business in the course of which the act in question is done, affords such servant or agent an opportunity to do the prohibited act and if he is allowed to escape the penalty imposed by law, the very purpose for which the law exists would be defeated.⁵

In such cases there is no question of intention, *menes rea* or of knowledge; but material point is the doing of the act which the law prohibits under a penalty.⁶ The purpose in such cases is to require a degree of diligence for the protection of the public which shall render violation exceedingly improbable, if not impossible.⁷ So, where the manager of a licensed vendor of arms, ammunitions and military stores sold certain military stores without previously ascertaining that the buyer was legally authorised to possess the same, the licensee was held liable to punishment as such sale was prohibited by the Indian Arms Act.⁸ Similarly, where contrary to the conditions of his master's opium licence the salesman sold opium to a person under the age of fourteen years in the absence of his master, both the master and the salesman were convicted.⁹ For the same reason a trader was held liable to a conviction for the illegal act of his agent in harbouring and concealing smuggled

1. See Kallar, pp. 629, 630, and the American authorities cited therein.

2. Ibid. p. 630.

3. Ibid. p. 631.

4. *A. G. v. Siddon*, 1 C. & J. 220; *Babu Lal v. King Emperor* 34 All 319; *K. E. v. Zauar Hussain*, 45 All. 541; *Sheo Ram v. Emperor*, 1923 Lah. 603.

5. Per Cooley C. J. in *People v. Roby*, 52 Mich. 577 (Am.).

6. Ibid. See also per Chennell J. in *Pearks Gunster v. Ward, Hannon v. Southern Counties Dairies Co.* (1902) 2 K. B. 1; *Babu Lal v. K. E.* 34 All. 319.

7. Per Cooley C. J. in *People v. Roby*, supra; Per Lord Tussell C. J. in *Metropolitan Police Commissioner v. Cartman*, 74 L. T. 726; also *Cooper v. Moore*, 78 L. T. 420, *Strutt v. Cliff*, 27 T. L. R. 14; *Shin Gye v. Emperor*, 43 I. C. 81 (F. B.), *Emperor v. U. Gyan*, 44 I. C. 847, *Bond v. Evans*, 21 Q. B. D. 249.

8. *Queen Empress v. Tyab Ali* 24 Bom. 428.

9. *Babu Lal v. King Emperor*, 34 All. 319 But see in the matter of Bhoolban Chunder Shaw & another, 11 C. L. R. 484.

although he was absent at the time.¹ A broker was held liable to a criminal charge for selling adulterated bread although the adulteration was put in by his servant and although he did not know that it was used in improper quantities.² The directors of a gas company have been held liable to an indictment for nuisance created by their superintendent acting under a general authority to manage the works, though they were personally ignorant of the particular plan adopted and although it was a departure from the original and understood method which they supposed him to be following.³ A shopkeeper has been held criminally responsible for not keeping his saloon closed on Sunday, though it appeared that it was opened by his clerk without his knowledge and consent, but while he was on the premises.⁴ So a master carrying on operations involving blasting was held liable to the penalties imposed by a statute where blasting was done by his servants without taking prescribed precautions even though the failure to comply with the statute was in direct violation of his instructions.⁵ But a licence holder has been held not liable for the act of a servant who knowingly sold intoxicating liquor in a bottle which was not corked and sealed to a child under the age of fourteen years without the knowledge or connivance of the license-holder, or of the person left in charge of the licensed premises.⁶ Similarly, where the servants of certain lessees of a ferry were guilty of exacting unauthorised tolls from passengers, the lessees not being present and taking no part in the extortion, it was held that the conviction of the masters was illegal in as much as the servants doing the act complained of had done something which was outside the scope of their employment.⁷ Where the master of a British ship overloaded her without the assent or knowledge of the owner, it was held that the owner was not liable to the penalty imposed by the Merchant Shipping Act.⁸

In cases where the act of the agent is criminal and not merely penal in the sense noted above, the principal is unquestionably not liable criminally unless he was present and co-operated with the agent or encouraged aided or abetted him or where though not present, he expressly or impliedly ordered or encouraged or incited the commission of the offence.⁹

He would be so liable if he directed the doing of an act which was in itself a crime or which necessarily involved or

- 1 *A. G. v. Siddons*, 1 C. & J. 220, *A. G. v. Riddle*, 2 C. & J. 493.
- 2 *R. v. Dixon*, 4 Camp. 12. See also *Brown v. Foot*, 56 L. T. (N. S.) 649.
- 3 *R. v. Medley*, 6 C. & P. 292. See also *Barnes v. Akroyd*, L. R. 7 Q. B. 474, *Queen v. Stephens*, L. R. 1 Q. B. 702.
- 4 *People v. Ruby*, *supra*.
- 5 *Spokane v. Patterson*, 8 L. R. A. (N. S.) 1194.
- 6 *Emery v. Nollath*, (1903), 2 K. B. 264, *Groom v. Grimes*, 89 L. T. 129.
- 7 *Beharilal v. King Emperor*, 8 A. L. J. R. 1324. See also *Satyed Rahim v. Emperor*, 29 I. C. 326 (Nag.) where the whole law on the point has been fully discussed.
- 8 *Macey v. Morris* (1894), 2 Q. B. 412. But see now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) s. 442.
- 9 See *Katar*, p. 633 and the authorities cited therein. See also *Suffer Ally Khan v. Golam Hyder Khan*, 6 W. R. Or. 80, *Uttam Chand v. Emperor*, 39 Cal. 344; *Local Government v. Lakshmichand* 8 C. P. L. R. 19; *Satyed Rahim v. Emperor*, 29 I. C. 326.

required the commission of a crime. But as a general rule he cannot be held criminally liable for the act of his agent committed without his knowledge and consent.¹

It has been held under the English law that except where otherwise expressly or by necessary implication provided by statute or in the case of a public nuisance no principal is criminally liable for any act or omission of his agent, unless he authorised or connived at such act or omission.²

See also notes on pages 455 and 456.

1. See Katlar, pp 633, 634 and the authorities cited therein.
2. Bowstead, Art 147, p. 346.

CHAPTER XII

RELATIONS BETWEEN AGENTS AND THIRD PERSONS.

82. Liability of agent in respect of contracts made by them. 84. Implied warranty of agent's authority. 85. Person falsely contracting as agent not entitled to performance. 86. Liabilities of agents in respect of moneys received. 87. Responsibility of agent for the payment of money received by him for the use of third persons. 88. Liabilities of agents in respect of wrongs committed on principal's behalf.

83. Liability of agents in respect of contracts made by them.

The agent, like the principal, may make himself liable in the course of his agency to the third party in two ways—by contracting with him, or by committing a tort against him.

As a general rule, as already noted, in the absence of any contract to that effect, an agent is not liable to the party he contracts with personally, on any contract made by him merely in his capacity of an agent, even if he make it fraudulently, knowing that he has not authority to do so.¹ Such a contract shall be presumed to exist in the following cases:—

Agent's liability by contract to third party.

(1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad.

(2) Where the agent does not disclose the name of his principal.

(3) Where the principal though disclosed cannot be sued.²

The question whether an agent who has made a contract on behalf of his principal, is to be deemed to have contracted personally and if so, the extent of his liability on the contract, depend on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances including any binding custom.³

Thus, where a solicitor buys in his own name certain freehold property, he is personally liable for the fulfilment of the contract although he was, in fact, acting on behalf of a client.⁴ So, where a solicitor bought property at a sale by auction, he was held personally liable for the deposit, though he openly declared that he was bidding as trustee for a client.⁵ An agent buys goods at a sale by auction, and gives his own name, which is entered as that of the buyer. He is personally liable, unless it be clearly proved that he did not intend to bind himself, and that the auctioneer knew that.⁶ So, where agent verbally orders goods on behalf of his principal, he is personally liable,

1. S. 230, Indian Contract, 1872, cited at p. 524

2. See Bowstead, Art. 116, pp. 283, 284.

3. Bowstead, Art. 116, pp. 283, 284.

4. *Saxon v. Blake* (1861), 29 Beav. 488.

5. *Hobhouse v. Hamilton* (1826), 1 Hog. 401, 12.

6. *Williamson v. Barton* (1862), 31 L. J. Ex. 172; *Chadwick v. Madden* (1861), 9 Hare 188.

unless the seller knows that he is contracting merely as an agent.¹ But he is not liable if he order the goods in the principal's name, and credit is given to the principal, or if he tell the seller that he does not intend to be personally responsible.²

A married woman living with her husband, and having no separate property, orders necessities, with the authority of her husband nothing being said by her, and no enquiries being made by the tradesman, as to whether she is pledging her husband's credit, or contracting on her own behalf. She must be taken to have contracted as the agent of her husband, and is not personally liable.³

A broker sent a contract note in his own name, and afterwards a corrected one in the name of the principal, the buyer receiving both notes together. Held, that it was a question for the jury whether he intentionally sent the first contract note in his own name, or sent it merely by mistake, and that if he sent it intentionally he could not, having contracted personally, afterwards discharge himself by setting up the agency, even if he were known to be a broker when he made the contract.⁴

Similarly, where some members of a club order supplies for the club on behalf of themselves and other members they are personally liable on the contract and it is not necessary to join the other members as defendants.⁵

An agent signed in his own name, without mentioning his principal, an undertaking to accept shares in a company, and the shares were allotted to him. Subsequently, the principal took a larger number of shares, in satisfaction, as the agent said, of his undertaking. Held, that the agent, having personally accepted the shares, was liable as a contributory.⁶

Auctioneer.

Where an auctioneer sells for an undisclosed principal, he is deemed to contract personally, and is liable in damages for non-performance, even if he subsequently offers to name the principal.⁷ The nature and extent of his contract with the purchaser in such a case depend on the conditions of sale, the nature of the subject matter and the other surrounding circumstances. For instance, in the case of a sale of standing corn with straw, to be removed at the purchaser's expense, it was held that the auctioneer contracted to give proper authority to enter and carry away the corn and straw, and undertook that he was in fact authorised to sell, but that he did not warrant the title.⁸ Where, however, an auctioneer sells a specific chattel by auction, he is not liable upon the contract of sale, nor does he impliedly warrant the title of his principal, although the name of the

1. *Saunders v. Hawkes* (1831), 5 M & P. 549.

2. *Ex p. Hartop* (1806), 12 Ves. 352; *Johnson v. Ogilby* (1734), 3 p. Wms. 277; *Bonfield v. Smith* (1844), 12 M & W. 405.

3. *Fagun v. Beaudclerk*, (1906) A. C. 145.

4. *Mages v. Atkinson* (1837), 2 M & W. 440.

5. *Cullen v. Queensbury*, (1781) 1 Bro. P. C. 896, H. L.

6. *Ex p. Bird* (1864), 683 L. J. Rk. 49.

7. *Franklyn v. Leonard* (1847), 4 C. B. 637; *Hanson v. Roberdeau*, (1798), 1 Peake 168.

8. *Wood v. Barter*, (1888), 49 L. T. 45.

principal has not been disclosed to the buyer.¹ In such a case, he impliedly warrants that he has authority to sell and that he knows of no defect in the title of his principal; and he undertakes to deliver the chattel in exchange for the price; but his contract with the buyer is independent of the contract of sale, which he makes on behalf of the seller and to which he is not a party.²

Where an auctioneer sold goods on behalf of a disclosed principal, the conditions of sale providing that the lots should be cleared within three days, and that if from any cause the auctioneer was unable to deliver, etc., the purchaser should accept compensation; held, that the auctioneer, being in possession of the goods, and having contracted to deliver, was personally liable to the purchaser for non-delivery³. So, where a sale by an auctioneer is advertised as being "without reserve" the auctioneer impliedly contracts to accept the offer of the highest *bona fide* bidder, and is liable to him in damages for breach of such implied contract if he accepts a bid from the vendor.⁴ But an advertisement to the effect that certain goods will be sold on certain days does not amount to a contract to sell them, so as to entitle a person, who acts on the advertisement to recover damages for loss of time or expenses if the goods are not put up for sale.⁵

A ship-master who signs a bill of lading and delivers, by mistake, the wrong goods to the consignee, is personally liable in an action for not delivering the goods pursuant to the bill of lading⁶. So, a shipmaster who engages the seamen is personally liable for their wages⁷.

Where an agent contracts personally, his liability under the contract may be expressly limited to certain events. Thus where a clause in a charterparty provided that the liability of the agent as to all matters - as well before as after the shipping of the cargo - should cease as soon as the cargo was shipped, it was held that he was not personally liable for demurrage at the port of discharge⁸.

A broker sells debentures in his own name without disclosing his principal, and sends to the buyer what purports to be a transfer signed by the principal and two other persons. The names of the two other persons were forged by the principal, and they compel the buyer to give up the debentures. The broker is personally liable to repay to the buyer the sum paid by him for the debentures.⁹

1. *Benton v. Campbell*, (1925) 2 K B 410

2. *Woolfe v. Horne* (1877) 2 Q B. D. 355. *Williams v. Millington* (1788), 1 H. Bl. 81.

3. *Warlow v. Harrison* (1858) 2 El & El 295, *Rainbow v. Hawkins*, (1904) 2 K. B. 322; *Mc Manus v. Fortescue* (1907) 2 K B 1.

4. *Harris v. Nicholson* (1873), L. R. 8 Q B. 286

5. *Bradley v. Dunipare* (1869), 32 L. J. Ex. 22, Ex. Ch. But see *Parsons v. New Zealand Shipping Co.*, (1901) 1 K B. 548.

6. *The Salania* (1863), 32 L. J. Adm. 41; *Buck v. Rawlinson* (1704), 1 Bro. P. C. 137.

7. *Ogleby v. Yglesias* (1858), 27 L. J. Q. B. 358.

8. *Royal Exchange Ass. v. Moore* (1863), 8 L. T. 242, *Gurney v. Womersley* (1854), 24 L. J. Q. B. 46.

Construction
of contracts
to ascertain
the liability
of the agent.

It has been held under the English law that the question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a bill of exchange, promissory note, or cheque, depends upon the intention of the parties, as appearing from the terms of the written agreement as a whole, the construction whereof is a matter of law for the Court—

(b) if the contract be signed by the agent in his own name without qualification, he is deemed to have contracted personally, unless a contrary intention plainly appear from other portions of the document;

(b) if the agent add words to his signature indicating that he signs as an agent, or for or on behalf of a principal, he is deemed not to have contracted personally, unless it plainly appear from other portions of the document, that notwithstanding such qualified signature, he intended to bind himself;

(c) the mere fact that the agent is described as an agent, whether by words connected with or forming part of the signature or in the body of the contract, and whether the principal be named or not, raises no presumption that the agent did not intend to contract personally¹

This article extends to cases where the contract is made on behalf of a foreign principal¹

Where an agent entered into a written agreement to grant a lease of certain premises and was described in the agreement as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he (the agent) would execute the lease, held, that the agent was personally liable for a breach of the agreement, though the premises belonged to the principal.²

The directors of a company signed a contract in the following terms— "We, the under-signed, three of the directors, agree to repay £500 advanced by A to the company," and at the same time assigned to A, as security, certain property belonging to the company. Held, that the directors were personally liable³ But where an agent signed a contract in the following form— "I undertake, on behalf of A (the principal), to pay, etc.," it was held that he was not personally liable.⁴

A broker sent a contract note in the following terms— "Messrs. S—I have this day sold by your order and for your account to my principals, etc., one per cent brokerage," signed "W A B". Held, that W A B. was not personally liable in an action for goods sold.⁵

A charterparty was expressed to be made between A B and C D, agent for E F & Son. and was signed by C D, without

1. Bowstead, Art 119, p. 292

2. *Norton v Hesson* (1825), 1 C & P 648

3. *Mc Colkin v Gilpin* (1881), 6 Q B D 516; C A

4. *Downman v Williams* (or Jones), (1845) 7 Q B 108, *Avery v Charlemouth*, (1914), 81 T L R 52, C A

5. *Southwell v Bouditch* (1876), 1 C P D 374.

qualification. Held, that C D was personally liable, though the principals were named, there being nothing in the terms of the contract clearly inconsistent with an intention to contract personally.¹

An agent was described in a contract as "consignee and agent on behalf of Mr. M of L," and it was stated that "the said parties agreed," etc, the contract being signed by the agent in his own name without qualification. Held, that the agent was personally liable.²

A contract in the following terms— "We have this day sold to you on account of J M & Co, Valencia, etc", was signed by home agents in their own names without qualification. Held, that the agents were not personally liable, though the contract was made on behalf of foreign principals the words "on account of" clearly showing that there was no intention to contract personally.³ So, where a home agent was described as contracting "on behalf of A B, Roanne," it was held that he was not liable, though he signed the contract in his own name without qualification.⁴

A charterparty was signed "For and on behalf of James Mc Kelvie & Co as agents, J A Mc Kelvie," but James Mc Kelvie & Co were described in the body of the agreement as charterers. Held, that James Mc Kelvie & Co were not personally liable, the qualified signature indicating an intention to exclude personal liability.⁵

When a person borrows money on a written document for the purposes of a third person and the creditor knows also for whose purpose the money is wanted, the executant of the document is only an agent and is not apparently liable.⁶

Where the plaintiff knew that the defendant was contracting for the repairs of certain tents as the manager of the Bonaili Raj and that the tents belonged to the Raj and that the Raj would pay for their repairs but did not know nor was he told by the defendant who was the owner of the Raj, it was held that the presumption of the defendant's personal liability did not apply or was sufficiently rebutted as the plaintiff's knowledge was sufficient to lead him to the discovery of the owner of the Raj.⁷

In a case where a man is an agent and describes himself as such, he may still be contracting in his personal capacity, but the mere fact that he fails to specify his capacity, as an agent, in signing a contract does not cause any such presump-

1 *Fisher v Winslow* (1857), 27 L J Q B 49

2 *Kennedy v Gouveia* (1823) 9 D & R 503

3 *Gadd v Houghton* (1876), 1 Ex D 357

4 *Ogden v Hall* (1879), 40 L T 751

5 *Universal & N Co v Mc Kelvie* (1923) A C 492, overruling *Lennard v Robinson* (1855), 24 L J Q B 275. See also *Kimber Coal Co v Stone* (1926) A C 414

6 *Mauing Po San v Ma Pan* (1892-96) U B R 470

7 *Gulzar Ahmad v Shiva Shankar Sahai*, 24 I C 415 (All).

tion when the terms of the contract itself are clearly to the contrary.¹

A broker who gives to the buyer a note in the form "bought by your order and for your account from our principal" is no more than an intermediary, and is not an agent of an undisclosed principal for sale, to make him personally liable as such.² So the presumption of the personal liability of an agent on contracts made by him for a merchant abroad, is rebutted, when the principal himself is, in writing, made the contracting party and the contract is made directly in his name.³

Admissibility
of parol evi-
dence of in-
tention.

Under the English law, where it appears from the terms of a written contract made by an agent that he contracted personally, parol evidence is not admissible to show that, notwithstanding the terms of the contract, it was the intention of the parties that he should not be personally liable thereon, because such evidence would be contradictory to the written contract; but he may, by way of equitable defence, prove a verbal agreement that, in consideration of his being merely an agent, he should not be personally liable on the contract, because it would be unequitable in such a case to take advantage of his having contracted personally.⁴

Where it appears from the terms of a written contract made by an agent that he contracted merely as an agent, parol evidence is nevertheless admissible to show that, by a custom or usage in the particular trade or business, an agent so contracting is liable on the contract, either absolutely or conditionally; provided that such custom or usage is not inconsistent with nor repugnant to the express terms of the written contract.⁵

Under the Indian Evidence Act, 1872, parol evidence is admissible in the case of a contract reduced to writing only to help in the interpretation of the language, and of such surrounding circumstances only as are not inconsistent with the terms of the written contract,⁶ but not to contradict, vary, add to or subtract from the terms of the contract.⁷ The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract may be proved.⁸ The proof of any usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of that description is admissible.⁹

Where an agent signed a charterparty expressly "as agent for principals", the principals being undisclosed, it was held

1. *G S Bharagava & Co v. B. Kobayashi* 2 L. L. J. 374. See also *Dutton v. Marsh*, L. R. 6 Q. B. 361, *Hick v. Tuscarg*, 63 L. T. 765, *Hahn v. North German Plowood Co.*, 8 T. L. R. 557.
2. *Patitiam Banerjee v. Kanhinarra Co.*, 42 Cal 1050—31 I C 607.
3. *Tutika Banerjee v. Parry & Co.*, 27 Mad 315.
4. *Bowstead*, Art. 120, p 296.
5. Section 92, proviso (6).
6. Section 92, Indian Evidence Act, 1872.
7. *Ibid*, Section 92, proviso (3).
8. *Ibid*, proviso (5).

that, although it plainly appeared that he did not intend to contract as principal, it might nevertheless be proved that, by a general custom, an agent so signing was, in the ordinary course of trade, personally liable on the contract in the event of his not disclosing the principals within a reasonable time, such a custom not being inconsistent with the terms of the contract.¹ A broker entered into a contract in the following terms:—"Sold by A to Messrs B, for and on account of owner, 100 bales of hops." An action was brought against A for not delivering the hops according to sample. Evidence of a custom in the hop trade, whereby a broker who does not disclose his principal at the time of the contract is personally liable, was admitted, and the broker was held liable on the contract.² Where, however, certain brokers entered as such into a contract which contained a clause providing that they should act as arbitrators in the event of any dispute between the parties it was held that the evidence of a custom rendering them personally liable on the contract was inadmissible, because the custom was inconsistent with the clause appointing them arbitrators.³

It has also been held under the English law that where an agent makes a contract which is not reduced to writing, the question whether he contracted personally or merely in his capacity of an agent is a question of fact.⁴ Thus, where brokers sell goods by auction, and invoice them in their own names as sellers, it is a question of fact whether the invoice was intended to be the contract. If it was, the brokers are personally liable. If it was not, it is a question of fact whether they intended to contract personally.⁵ An estate agent contracted to sell land, and gave a receipt in his own name for the deposit. Held, that it was a question of fact whether he contracted personally.⁶ So, where an agent bought goods at a sale by auction, and gave his own name as buyer, it was left to the jury to say whether he contracted personally.⁷

Verbal contracts

The liability of an agent on any contract made by him is discharged by a judgment being obtained against the principal on the contract.⁸

Effect of judgment against principal.

Where a person professes to contract as an agent, whether in writing or verbally, and it is shown that he is, in fact, himself the principal, and was acting on his own behalf, he is personally liable on the contract.⁹

Agents shown to be the real principal

Although an agent is not personally liable when he contracts on behalf of an association and not personally,¹⁰ yet, if the

Liability of the agent when the principal is a corporation.

1 *Hutchinson v Tatham* (1873), L R 8 C P 482

2 *Pike v Ungley* (1887), 18 Q B D 708

3 *Barrow v. Dynter* (1884), 18 Q B D 635

4 *Bowstead*, Art 141, p 297

5 *Jones v Littledale* (1837), 6 A & E 486

6 *Long v Mills* (1879), 4 C P D 450

7 *Williamson v Barton* (1862), 7 H & N 899

8 *Bowstead*, Art 122, p 298

9 *Bowstead*, Art 123, p 298

10 *Mohammad Mookkam v. Ramzanee*, 10 P R 1868, *Meer Khan v Munda* 30 P R. 1867

secretaries of societies make contracts without disclosing the names of the persons under whose authority they are acting they render themselves liable for the performance of the contracts they have made.¹ But a secretary of a club or one individual member of it cannot be sued personally, unless he accepts the personal liability, for the goods delivered to the former secretary for the use of the club, nor can the club be sued through its secretary.² So an action to recover the price of the goods supplied to a member of a social club or on his responsibility, cannot be brought against the secretary of the club, unless the money is due on a contract made with him.³ In a suit for recovering salaries or wages due from an incorporated company, the company itself is the proper defendants. Such a suit is not maintainable against the Secretary or the managing director of the company who cannot be made defendants at all.⁴ So no individual member of a club is liable for the debts of the club unless he has pledged his personal credit for its payment.⁵

Liability of public agents for acts done and contracts entered into on behalf of the State.

The Indian Contract Act, 1872, omits all notice of public agents, who stand according to English Law in an exceptional position. In the ordinary course of things a public agent is not personally liable upon contracts made under circumstances which would render him liable if the agency were of a private character. The reason of this rule is two fold: first because the natural presumption is that contracts made with a public officer were made upon the credit and responsibility of the Government and that it is ready and able to fulfil them liberally; and secondly because it would deter persons from accepting offices of trust under Government, if they were held liable on the official contracts. In the absence of both these reasons, the presumption of official immunity may be rebutted. Thus, where it is shown that the party dealing with a public agent was unaware of his character, it may be presumed that credit was given to him personally.⁶ Where, however, the servant of the Crown is body incorporated under a statute with power to sue and be sued in its own name this prohibition does not apply as it is deemed a component part of the state and, therefore, itself a principal to deal with its affairs within the bounds, if any, fixed by the statute.⁷ The same principles apply to torts committed by the public agents in public or official capacity.⁸

84. Implied warranty of agent's authority.

Liability of pretended agent.

A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does

1. *Bhajibhai Allarakhia v. Hayen Samuel*, I. L. R. 22 Bom. 754.
2. *Secretary v. Sadullah*, 20 All. 497.
3. *Michael v. Briggs*, 14 Mad. 362.
4. *Abdul Haq v. Dae Mal*, 19 I. C. 595.
5. *Kanwar Razoor Singh v. F. B. Hebbert*, 15 P. R. 1891.
6. *Palmer v. Hutchinson*, 6 App. Cas. 626. See also *Story*; §. 802; *Bowstead*, Art 115, p. 282, *Secretary of State for India v. Sutemartji*, I. L. R. 26 Bom. 801.
7. *Roper v. Public Works Commissioners*, (1915) 1 K. B. 45.
8. *Row v. Secretary of State for India*, I. L. R. 37 Mad. 55.

not ratify his acts to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

(S. 235, *Indian Contract Act, 1872*).

The above rule applies to the case of a person who represents that he has authority from another when he has no authority whatever, as well as to person who represents that he has a certain authority from another when he has authority of another description, that is, who untruly represents the extent of the authority given to him by another.¹ To render the agent liable under the above rule it is only necessary that the representation should have been untrue in fact and it is not necessary to show that the agent was in any way to blame.² The words "if his alleged principal does not ratify his acts" appear to indicate a named principal.³

The basis of the above rule is not a contract but the warranty and the measure of damages is the benefit the contractee would have derived, if the representation had been true. Consequently, when there is a contract by several persons, each making himself jointly and severally liable and the representation by one of them to be the authorised agent of third person proves untrue, the contractee is entitled to the joint and several liability of the person signing as agent and such person can be joined at once in an action on the contract, although the basis of his liability is the warranty. It is not necessary that the loss suffered by the contractee should be first ascertained by a suit against the remaining contractors.⁴ Where there is a matter of doubt as to the liability of the agent or the principal in a contract, the usual course is to sue both defendants alleging that the principal was the principal to the contract and in the alternative suing the agent for warranty of authority.⁵

The above rule is in accordance with the English law as established by *Collen v. Wright*.⁶ The duty is grounded on an implied warranty by the agent that he has authority, and the action, being in contract, lies even if the agent honestly believed he had authority, and against executors (in which case an action in tort for deceit does not lie in England). The doctrine has been fully confirmed by later authorities and by the House of Lords.⁷ An agent who purports to report the other party's intentions does not thereby make himself that party's agent to deal with his original principal. It may be a breach of his original duty as agent if his report is incorrect, but he is not liable under the rule in *Collen v. Wright*⁸ on an implied warranty of authority from the other party to conclude the transaction.⁹

1. *Ganpat Prasad v. Sarju*, 34 All 169—19, I. C. 94.

2. *Haji Inmail v. James Short*, 8 I. O. 291=1 M. W. N. 513.

3. *Ramdas Topandas v. Kodanmal*, A. I. R. 1933 Sind 207=148 I. C. 372.

4. *Kishori Prasad v. Secy. of State*, 42 C. W. N. 116.

5. *Raghunath v. Kesari Lal*, A. I. R. 1934 Pat 269=150 I. C. 671.

6. (1857) 7 E. & B. 301, in Ex. Ch. 8 E. & B. 647.

7. *Starkey v. Bank of England*, (1908) A. C. 114.

8. *Chr. Salvesen & Co. v. Rederi Aktieselskabet Nordstjernen*, (1908) A. C. 302.

THE ENGLISH LAW ON THE SUBJECT IS THUS STATED BY HOWLAND:-

"Where any person, by words or conduct, represents that he has authority to act on behalf of another, and a third person is induced by such representation to act in a manner in which he would not have acted if such representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such third person by a breach of such implied warranty even if he acted in good faith, under a mistaken belief that he had such authority. Where any such representation is made fraudulently, the person injured thereby may sue either in contract for the breach of warranty, or in tort for the deceit, at his option.

Every person who professes to contract as an agent is deemed by his conduct to represent that he is in fact duly authorised to make the contract, except where the nature and extent of his authority or all material facts known to him from which its nature and extent may be inferred, are fully known to the other contracting party

This article does not extend to a representation made in good faith with regard to a question of law, in which no representation of fact is involved "

The word "untrue" in section 235 of the Indian Contract Act may perhaps imply (as is held in England) that the representation must be of matter of fact ²

A public servant acting on behalf of the Government is not deemed to warrant his authority any more than to make himself personally liable on the contract,³ and for the same reason of policy

If a man goes through the form of contracting as an agent but warns the other party that he has at the time no authority, he is obviously not liable under the above rule⁴ It seems a nice question whether there is in such a case anything which the named principal can ratify, or anything more than an offer to him, liable to revocation like any ordinary proposal.

Where the authority is disputed by the person on whose behalf the contract is made, the person who made the contract may be joined with him as a co-defendant, and relief may be claimed against them alternatively.⁵ Where, however, representation of authority is made in good faith under a mistaken belief of a certain point of law⁶ or where both parties are labouring under a mistake of fact,⁷ or where the other contracting

1. Art. 135, p 300

2. *Beattie v Lord Ebury* (1872) L. R. 7 H. L. 102, *Weeks v Probert* (1875), L. R. 8 O. P. 427, *Shet Montibai v Bai Rupalibai* (1899) 24 Bom 166, 170

3. *Dunn v Macdonald* (1897) 1 Q. B. 555, O. A.

4. *Halbat v. Lens* (1901) 1 Ch. 844

5. *Honduras Bull Co. v. Lefevre*, 46 L. J. Ex. 391, *Bennets v. Mc Ilharath* (1896) 3 Q. B. 464.

6. *Per Mellish L. J. in Beattie v. Lord Ebury*, L. R. 7 Ch. A. 777 (500), *Rushdall v Ford*, L. R. 2 Eq. 760 See also *Eglefield v Lonsanerry*, 33 L. T. 308.

7. *Lilly v Smalke* (1896) 1 Q. B. 466; *Smout v. Ilbery* 10 M. & W. 1 1 *Sutton v. New Boston Cycle Co.*, (1900) 1 Ch. 43

party knows that the agent is assuming authority under a mistaken belief on a point of law or fact¹ or where the procuring agent expressly disclaims any present authority he is not liable unless he, by the express terms in the contract personally undertakes the performance of the contract either in the first instance or on the failure or refusal of the principal to perform it.²

The directors of a company wrote a letter to the company's bankers representing that A had been appointed manager and had authority to draw cheques on the company's account, which, to the knowledge of the directors, was already overdrawn. A further overdraw the account, the directors having, in fact, no authority to withdraw. Held, that the directors were liable to the bankers for breach of an implied warranty that they had authority to withdraw.³ But the mere fact that directors of company in that capacity sign cheques drawn on the company's bankers after the account is overdrawn, does not amount to a representation that they have authority to overdraw the account or to borrow money on the company's behalf.⁴

A lent £70 to a building society, and received a certificate of the deposit, signed by two directors. The society had no borrowing power. Held, that the directors were personally liable to A on an implied warranty that they had authority to borrow on behalf of the society.⁵

The directors of a company issued a certificate for debenture stock, which A agreed to accept in lieu of cash due to him from the company, all the debenture stock that the company had power to issue having already been issued. Held, that the directors were liable to A on an implied warranty that authority to issue valid debenture stock although they had acted in good faith, not knowing that all the stock had been issued.⁶ So, where directors of a company which had already fully exercised its borrowing powers, issued a debenture bond, it was held that the directors thereby impliedly warranted that they had authority to issue a valid debenture.⁷

The directors of an unincorporated company held out the secretary as having authority to borrow in excess of the amount prescribed by the rules of the company. The secretary borrowed in excess of such amount, and misappropriated the money. Held, that the directors were personally liable to the lenders on an implied warranty of authority, though they had not acted fraudulently.⁸

A stockbroker, acting in good faith, induces the Bank of England to transfer consols to a purchaser under a forged power

1. *Haibet v. Lenz*, (1901) 1 Ch. 844.

2. *Mechem*, §. 1870; *Haibet v. Lenz*, *supra*.

3. See *Bowrand*, Art. 125, p. 800.

4. *Cherry v. Colonial Bank* (1909), 85 L. J. P. C. 42, P. C.

5. *Mechem*, §. 1870.

of attorney. He is liable, in an action for breach of an implied warranty of authority, to indemnify the Bank against the claim of the stockholder for restitution.¹

A acts as broker for both buyer and seller. He impliedly warrants to each that he is duly authorised to act on behalf of the other.²

Where an auctioneer by mistake sells a horse by auction without authority, he is liable to the purchaser for an implied warranty of authority for loss of the bargain.³ Where, however, goods are sold by auction under conditions which provide that each lot shall be offered subject to a reserve price, and the auctioneer having by mistake accepted a bid for less than the reserve price, and discovered his mistake at once, withdraws the lot, and refuses to sign a memorandum of the contract, he is not liable in an action for breach of implied warranty of authority, because in such a case the offer, bidding and acceptance are all conditional on the reserve price having been reached and the condition was known to the other party.⁴

The directors of a company accepted a bill of exchange drawn on the company, but told the drawer that they had no power to accept bills on the company's behalf and that they did it merely in recognition of the company's debt, and on the express understanding that the bill should not be negotiated. Held, that the directors were liable to an indorsee for value, who had no notice of the circumstances, on an implied warranty that they had authority to accept the bill on behalf of the company.⁵

Where a widow, not having received any information as to her husband's death, ordered necessities from a tradesman who had previously supplied goods to her on the credit of the husband and been paid for them by him, the husband to the knowledge of the tradesman, being resident abroad, it was held that the circumstances being equally within the knowledge of both parties, and the widow not having omitted to state any fact known to her which was relevant to the existence or continuance of her authority, she was not liable for the price of the necessities.⁶ So, a person purporting to contract as agent is not liable for breach of warranty of authority if the other party be aware that he is not in fact authorised, or the professing agent expressly disclaim any present authority.⁷

A professes to contract on behalf of a volunteer corps with B, both parties erroneously thinking that the corps as an entity may be bound. A is not liable to B on an implied

1. *Starkey v Bank of England* (1908) A. C. 114. See also *Bank of England v Cutler* (1908) 2 K. B. 308.

2. *Hughes v Grimes* (1864), 38 L. J. Q. B. 835.

3. *Anderson v. Croull* (1904) 6 F. 153.

4. *Mc Manus v. Fortescue* (1907) 2 K. B. 1; *Rainbow v Harlins*, (1904) 2 K. B. 322.

5. *West London Bank v. Kitten* (1884), 13 Q. B. D. 380.

6. *Smart v Harvey* (1842), 10 M. & W. 1. In *Sutton v New Boston Cycle Co* (1900) 1 Ch. 48, the principle was applied in the case of the dissolution of a company.

7. *Halbet v. Lens*, (1901) 1 Ch. 344.

warranty of authority, because the facts were equally well known to both, and there was merely a common misconception in point of law.

A ship broker signed a charter-party "by telegraphic authority, as agent." It was proved that such a form of signature was commonly adopted to negative the implication of any further warranty by the agent than that he had received a telegram, which if correct had authorised such a charter party as he was signing. The shipbroker held not answerable for a mistake in the telegram.¹ Where, however, C a ship broker professes to make a charter-party on behalf of A, and signs it "by telegraphic authority of B; G H as agent." B is A's agent, but A did not authorise the charterparty. He is liable for breach of an implied warranty that he had authority to make the charterparty on behalf of A, though he acted in good faith, believing that the telegram from B gave him such authority.²

The doctrine that an agent contracting on behalf of his principal is liable to the other contracting party for breach of implied warranty of authority to enter into the contract is not applicable to a contract made by a public servant on behalf of the Crown.³

An untrue representation of agency falling under S 235 of the Contract Act need not necessarily be made in express and literal words; it may be conveyed by any words, spoken or written, combined with acts or omissions which under the circumstances of the particular case do in fact lead the person induced to contract into a reasonable belief that the professed agent has the authority represented.⁴ The very fact of acting on behalf of alleged principal amounts to a representation that there was authority from the latter.⁵

Representation may be implied,

The liability of a pretended agent under this section does not arise, unless the representation that he is the agent of another is false, and also induces the person to whom the representation is made to deal with him as such agent. A representation by the defendant to the plaintiff that she is the duly authorised agent of her minor son does not render her liable under this section, if the plaintiff knows that the son is a minor. For a minor cannot appoint an agent (S 183,), and consequently no warranty such as would support a suit could arise out of such a representation.⁶

Representation must be effective

An agent assuming authority which he does not possess is personally liable.⁷ Where a person by asserting that he has

Agent assuming authority.

1 *Jones v Hope*, 3 T L R 247 n C A

2 *Lilly v Smiles* (1892) 1 Q B 456

3 *Suati v. Haigh* (1898), 9 T L R 488, H L

4 *Dunn v Macdonald*, (1897) 1 Q B 555

5 *Bhawani Prasad v Shri Narayan*, 17 C P L R 67

6 *Vairavan v. Aichan*, 88 Mad 275=21 I C 65

7 *Shet Manibhai v Bai Rupaliba* (1899) 24 Bom 166, citing *Beattie v Lord Ebury*, L R 7 Ch 777. A minor's guardian is not in all respects his agent, and the section is not in terms applicable to a guardian. *Met Mida v. Kishan Behadur*, A I R 1934 All 645

8 *Oliver v Bank of England*, (1902) 1 Ch 510

... authority of the principal, induces another person to enter into any transaction, which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it understood that it was true, and he is personally liable for the damage that has occurred. The fact that the pretended agent has acted under the belief that he had the authority he represented himself to have does not affect his liability under this section except in the cases where he would be protected under S. 208. So, where a company signed charter-party as "agents for master and owner" when in fact there was no authority to act as such, the company was held liable.¹ When a purchase is made by a certain person on behalf of another representing himself to be his agent but the latter repudiates the liability, the seller would recover the price from the former.² If a person borrowed money from a creditor purporting to act as agent of Devasthanam and the creditor advanced money on the faith of that representation, he is bound to recoup the loss to which he has put the creditor when it turns out that he had no authority as represented.³

representa-
tion on a
point of law.

But the secretary of a school is not personally liable to pay the compensation which may be due to one of its teachers owing to his services being dispensed with though the teacher might have been provisionally appointed by the secretary.⁴

The untrue representation under S. 235 of the contract Act must be one of fact and not merely one of law.⁵ A representation regarding a power to bind the estate does not come under this section where the representation was on a point of law, e. g., where a person represented to the plaintiff that she was the agent of her son who was known to the plaintiff to be a minor, and the plaintiff must have been aware that the representation was incorrect for an infant cannot appoint an agent, and consequently no warranty such as would support a suit could arise out of such a representation.⁶

measure of
damages for
breach of
warranty of
authority

In England, the action being founded on contract, and not on tort, the measure of damages is the loss sustained, either as a natural and probable consequence, or such as both parties might reasonably expect to result as a probable consequence, of the breach of warranty.⁷ Where a contract is repudiated by the person on whose behalf it was made on the ground that it was made without his authority, such loss is *prima facie* the amount of damages that could have been recovered from him in an action at law if he had duly authorised and refused to preform the contract, together with the costs and expenses (if any)

- 1 (1903) 1 Ch 610 *Collen v Wright*, 8 E. & B. 647, *Fairbank's executors v Humphreys*, 18 Q B D 54
- 2 *Bhawani Prasad v Shri Narayan*, 17 C. P. L. R. 67
- 3 *Hanoubhey v Clapman*, 7 Bom 51
- 4 *Ratan v Hafizullah*, 73 I C 1011
- 5 *Venkatachariyulu v Ram-Krishna*, A I R. 1930 Mad 439
- 6 *Bhupendra v. Jatinidra*, A I R 1929 Cal 289
- 7 *Bhawani Prasad v Shri Narayan*, 17 C P L R. 67
- 8 *Seth Manubhai v Bai Eupaliba*, 24 Bom 166, *Mai Malda v. Kishan*, A I R 1934 All 645.

1. Bowstead, Art 126, p 304

in respect of any legal proceedings reasonably taken in respect of the contract. Where the contract would not be enforceable at law, as against the principal, even if duly authorised it, because the formalities required by law are not observed, the equitable doctrine of part performance does not appear so as to give a remedy in equity for damages in respect of the breach of warranty of authority.¹ Nor is there a remedy at law in such a case, because the contract not enforceable at law, there is no legal damage from the breach of the warranty.² For instance, where A contracts with B, without authority, to sell real estate of B to C, C has no remedy either in equity³ or in law,⁴ against A for the breach of warranty of authority, on the ground of part performance.

The person acting on the misrepresentation is entitled not to recover any loss actually sustained through being misled, so any profit which he would have gained if the representation had been true.⁵ The directors of a company represent they have authority to issue debenture stock, and A is induced to accept such stock in lieu of cash, in payment of a debt owing to him by the company. The measure of damages in respect of the implied warranty of authority is the amount which could have been recovered from the company if the stock had been valid.⁶ If an agent contracts, without authority, to buy goods at a price in excess of their value, and the principal repudiates the contract as unauthorised the measure of damages recoverable against the agent is the difference between the contract price and the market value of the goods.⁷ Similarly, where an agent, who was instructed to apply for shares in a company by mistake, and they were allotted to the principal, who repudiated them shortly afterwards in the winding up of the company, it was held that, the principal being solvent and the shares valueless, the measure of damages payable by the agent to the liquidator was the full amount payable on the shares.⁸ If the third person reasonably⁹ takes proceedings against the principal for the enforcement of the unauthorised contract, the damages recoverable against the agent include the costs and expenses incurred by the third person in respect of the proceedings.¹⁰

It has been observed that it is open to question whether in the case of the compensation recoverable under S 235 of the Contract Act all be assessed on the same principle and that the language used seems more appropriate to an action in the nature of an action of deceit than to one founded on a warranty.¹¹

¹ See, e.g., Art. 126, p. 304.

² *Mann v. Fortescue* (1907) 2 K. B. 1.

³ *W. v. Jones*, 21 W. R. 695; *Gainsbury v. Jones*, 2 Beav. 462.

⁴ The Statute of Frauds, s. 4.

⁵ *Wright v. Humphreys* (1886), 18 Q. B. D. 54.

⁶ *Woods v. Patchett* (1887) 7 E. & B. 568.

⁷ *Porte v. Panniere* (1883) 24 Ch. D. 867.

⁸ *Pow v. Davis* (1861) 1 B. & S. 220.

⁹ *Wadding v. Newell* (1869) L. R. 4 C. P. 212; *Hughes v. Greene* (1864) 38 J. Q. B. 835.

¹⁰ Pollock & Mulla, p. 621, citing *Vairavan Chettiar v. Asoka Chettiar*, (1915) Mad. 275, 276—21 I. C. 65.

Limitation.

As held by the High court of Madras, a suit for damage against a person for untruly representing himself to be the agent of another is governed by Art. 115 of Sch. I of the Limitation Act.¹

85. Person falsely contracting as agent not entitled to performance.

A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

(S. 236, Indian Contract Act, 1872)

English authorities make a distinction in this matter between contracts on behalf of a named principal and those in which the principal is not named. In the former case the agent cannot substitute himself for the principal,² though the other party may by words or by contract, such as acting on the contract after knowledge that the nominal agent was the real principal, deprive himself of the right to object; and it has been suggested, though not decided, that the agent might be allowed to take up the contract for himself on condition of being subject to all defences available against either himself or the named principal.³ But where the principal is not named the third party is contracting with the principal, whoever he may be, and there is no obvious reason why he should be presumed willing to deal with any unknown person in the world, provided that he is capable of being sued, and unwilling to deal with the nominal agent, the only person he knows in the matter. Accordingly a person who made a charter-party as agent for an unnamed freighter has been allowed to show that he was the freighter himself.⁴

The language of section 236 of the Contract Act, however does not seem to admit such distinction. In fact, the English rule is also not clear of doubt.⁵ This section is meant to apply to cases where a person enters into a contract with another on the basis that other person is acting for somebody else.⁶ If a person purports to act as agent for an undisclosed principal and there is no undisclosed principal in fact, S. 236 applied and he cannot sue on the contract.⁷ This section is not restricted to cases where an agent purports to act for a named principal, but follows the rule underlying the cases of *Rothschild v. Brookman*,⁸ and *Robinson v. Mollett*,⁹ that an agent cannot recover on a contract if he really acts as a principal¹⁰. Section 236 does not enact that the contract in the circumstances mentioned is

1. *Vairaban Chettiar v. Airocha Chettiar*, supra.

2. *Bickerton v. Burrell* (1816) 3 M. & S. 383.

3. *Schmalz v. Avery* (1851) 16 Q. B. 655.

4. *Schmalz v. Avery* (1851) 16 Q. B. 655.

5. See Pollock & Mulla, p. 622.

6. *Kota Chinnu v. Nalam Venuanathan*, 42 I. C. 387.

7. *Randus Topandas v. Kadanmal*, 1933 Sind 207=148 I. C. 872.

8. *Rothschild v. Brookman*, 2 Dew & Cl. 188.

9. *Robinson v. Mollett*, L. R. 7 E. & L. App. 802.

10. *Sachdev Roy Maskara v. Nahapiet* (1937) 54 Cal. 628; *Nand Lal Roy v. Gurupada Halder*, (1924) 51 Cal. 189; and see *Shree Shree Gopal Shreedhar v. Shashie Bhushan*, 1933 Cal. 109.

aid—it provides that the alleged agent cannot require its performance. It follows that since the contract is enforceable by one of the parties and not enforceable by the other, it is a voidable contract.¹

It has been held by the Calcutta High Court that this section is not restricted to cases where an agent purports to act for a named principal.² If a person professing to act as an agent for an undisclosed principal enters into a contract with another, and there is no undisclosed principal in fact, this section at once applies, and he cannot sue on the contract.³

Conversely, where a man has contracted in writing in terms importing that he is the sole principal, *e. g.* made a charter-party "owner of the ship A," another person cannot be allowed to sue on the contract as an undisclosed principal.⁴

A broker who enters into a contract for and on behalf of his principal is not entitled to sue upon the contract even though the principal be undisclosed, the ground being that he broker has expressly contracted as a broker. And even if he broker was entitled to enforce the contract upon the footing of *Gubby v. Avelton*,⁵ this suit must fail under this section if he was in reality acting not as agent but on his own account.⁶

It has been held under the English law that "where a person professes to contract on behalf of a principal, and the principal is a fictitious or non-existent person, the person so professing to contract is presumed to have intended to contract personally, unless contrary intention be proved, and where the contract is in writing, such intention cannot be proved by parol evidence, but must appear from the terms of the contract or from the surrounding circumstances." Thus, if A enters into a written contract on behalf of a company not yet incorporated, A is personally liable on the contract, even if he express himself as contracting on behalf of the future company, and parol evidence is not admissible to show that he did not intend to contract personally, because it is only by holding him personally liable that any effect at all can be given to the contract.⁷ Similarly, where the promoters of a future company borrowed money from a bank, to be repaid out of calls on shares, the promoters must be taken to have contracted to repay the money out of calls, if the calls should prove sufficient, and if not, to pay personally.⁸

principal
fictitious or
non-existent

1 *Ramdas Topan Das v. Kodanmal*, 1933 Sind 207.

2 *Sandutt Roy Mahipara v. Nahapiet* (1907) 54 Cal 628, *Nanda Lal Roy v. Gurnupada Hinda* (1924) 51 Cal. 582, and see *Shreedhar v. Shashubhushan*, 1938 Cal. 109=142 I. C. 465.

3 *Ramji Das v. Janikdas*, (1912) 39 Cal. 802=17 I. C. 973.

4 *Humble v. Hunter* (1848) 12 Q. B. 310. But this does not extend to the term "charterer," which is consistent with agency for an undisclosed principal: *Rederi Aktienbolaget Transatlantic v. Fred. D. Dughorn* (1918) 1 K. B. 394 C. A., affirmed in H. L. (1919) A. C. 203.

5 17 Cal. 449.

6 *Nanda Lal v. Gurnupada*, 1924 Cal. 738=51 Cal. 558.

7 *Rowland*, Art. 124, p. 239.

8 *Kelner v. Baxter* (1866), L. R. 2 C. P. 174. A company cannot ratify a contract before its incorporation.

9 *Scott v. Emery* (1867), L. R. 2 C. P. 255.

The managing committee of a club authorise the steward to order provisions for the use of the club. A supplies provisions on his orders, and invoices them to the club. If A looked to the funds of the club alone for payment, and contracted on the term that if there were no such funds, he should not be paid, the committee are not personally liable. But they are personally liable if he gave credit to them.¹ Whether A gave credit to the committee or looked to the funds of the club alone is a question of fact.¹

A, a colonel of a volunteer corps, contracts on behalf of the corps with B. A does not intend to pledge, nor does B intend to accept, his personal credit, but both think that the corps as an entity may be bound. A is not personally liable on the contract.²

86. Liabilities of agents in respect of moneys received.

As a general rule, an agent is not liable for the refund of money which has been paid to him for the use of the principal.³ But there are exceptions to this general rule which are based on similar considerations as those concerning his liability for the contracts.⁴

Bowstead thus states the rule of English law on the subject:⁵

"Where money is paid to an agent for the use of his principal, and the circumstances of the case are such that the person paying the money is entitled to recover it back, the agent is personally liable to repay such money in the following cases, namely —

(a) Where the agent contracts personally, and the money is paid to him in respect of or pursuant to the contract unless the other contracting party elects to give exclusive credit to the principal;

(b) Where the money is obtained by duress, or by means of any fraud or wrongful act to which the agent is party or privy;

(c) Where the money is paid under a mistake of fact, or under duress, or in consequence of some fraud or wrongful act, and repayment is demanded of the agent, or notice is given to him of the intention of the payer to demand repayment, before he has in good faith paid the money over to, or otherwise dealt to his detriment with, the principal in the belief that the payment was a good and valid payment.

Except as in this Article provided, no agent is personally liable to repay money received by him for the use of his principal.⁶

This rule has been quoted with approval in *Kulandaivelu v. Ramaswami*.⁷ In this case the plaintiff, who owed first defend-

1. *Steele v. Gundry* (1887) 3 T. L. R. 722, Q. B.

2. *Jones v. Hope*, (1880) 3 T. L. R. 247, N. C. 4.

3. *Ellis v. Goulton* (1898) 1 Q. B. 250; *Bamford v. Shuttlesworth* 11 A. & P. 928.

ant a sum of money, paid it to the second defendant, first defendant's agent, as such. The second defendant misappropriated it subsequently and did not account for it to the first defendant. First defendant then sued the plaintiff for the sum and obtained a decree against him as the latter did not appear or plead the discharge on the basis of the payment to the second defendant. In the present suit he claimed recovery of the amount from the second defendant. The court after fully going through all the heads of liability of the agent as contained in this Article held that the plaintiff was not entitled to recover the amount from the second defendant. Following *Ellis v. Goulton*¹ the Court treated the remarks in *Cary v. Webster*² that if the agent had not paid the money to the principal, he on his principal would have been liable at the payer's option,—as obiter dictum.

An agent discounts certain bills, and in good faith pays over the proceeds to his principal. The bills turn out to be forgeries. The discounter has no remedy against the agent unless he indorsed or guaranteed the bills or dealt as a principal with the discounter.³ But the agent is personally liable to repay the amount, as upon a total failure of consideration if he dealt as a principal with the discounter.⁴

An agent demands more money than is due, and wrongfully withholds documents from A, who pays him the amount demanded, under protest, in order to recover the documents. The agent is personally liable to A in respect of the amount overpaid, even if he has paid the money over to the principal.⁵

A bought goods from B, a broker, and by mistake paid him too much. B gave his principal, who was largely indebted to him, credit for the amount received. Held, that B was liable to repay to A the amount paid in excess, on the ground (1) that B virtually dealt as principal, with A, and (2) that the mistake accrued to B's personal benefit.⁶ Where there is no actual change of circumstances to the detriment of the agent in consequence of the payment, the mere fact that he has credited the principal with the amount is not sufficient to discharge him from liability to repay money paid to him under a mistake of fact.⁷

The auctioneer at a sale by auction receives a deposit, and pays it over to the vendor. He is personally liable to refund the amount on the default of the vendor, because it was his duty to hold it as a stakeholder until the completion or rescission of the contract.⁸ But he is not liable to pay interest, however long he may have held the deposit, until it has

1. (1895) 1 Q. B. 350.

2. 1 Str. 480.

3. *Ex p. Bird, re Bourne* (1851), 50 L. J. Bk. 16.

4. *Gurney v. Womersley* (1854), 4 E. & B. 139; *Royal Exchange Ass. v. Moore* (1863), 8 L. T. 242.

5. *Smith v. Sloop* (1844), 19 M. & W. 585.

6. *Neall v. Tomlinson* (1871), L. R. 6 C. P. 405.

7. *Buller v. Harrison* (1777), Cowp. 565; *Scottish Met. Ass. Co. v. Samuel*, (1932) 1 K. B. 348.

8. *Burrough v. Skinner*, (1770), B. Burt. 2639.

been demanded, and he has improperly refused to pay it over to the person entitled"—at all events unless he is shown to have received interest on the money.²

A bill of exchange was indorsed, without the holder's authority, to A. The acceptor paid A's agent for collection, who handed the money over to A without notice of any defect in A's title. The acceptor was compelled to pay over again to the holder whose authority was wrongfully assumed. Held, that A's agent for collection was not personally liable to refund the amount to the acceptor.³

57. Responsibility of agent for the payment of money received by him for the use of third person.

It has also been held under the English law that where a specific fund existing or accruing in the hands of an agent to the use of his principal, is assigned or charged by the principal to or in favour of a third person, the agent is bound, upon receiving notice of the assignment or charge to hold the fund, or so much thereof as is necessary to satisfy the charge, to the use of such third party.⁴

Where an agent is directed or authorised by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he has had fresh instructions from the principal not to pay such third person.⁵

Except as above provided, no agent is liable or accountable to any third person in respect of money in his hands which he has been directed or authorised to pay such third person.⁶

As an illustration of the above rule, where a principal assigns a specific fund existing or accruing in the hands of his agent to his use and the assignee gives notice to the agent of the assignment, the agent is bound to account for the fund to the assignee,⁷ subject to any right of lien or set-off the agent may have against the principal at the time when he receives notice of the assignment.⁸ So, if a debtor charges a fund in the hands of his agent with payment of the debt, the agent is liable to the creditor upon receiving notice of the charge.⁹

A principal gives his agent authority to pay money to A, a third person. The agent promises A that he will pay him when the amount is ascertained. The agent is liable to A for the amount when it is ascertained, though in the meantime the principal has become bankrupt,¹⁰ or has countermanded his authority.¹¹

1. *Lee v. Munn* (1817), 1 Moore 481.

2. *Curling v. Shuttleworth*, (1829), 6 Bing 121, 124.

3. *East India Co. v. Tritton* (1824), 5 D. & B. 214.

4. *Bowstead*, Art 128, p. 810.

5. *Webb v. Smith*, (1885), 80 Ch. D. 192; *Brandt v. Dunlop Rubber Co.*, (1906) A. C. 454.

6. *Beauregard v. Cox* (1881), 17 Ch. D. 520.

7. *Croftnot v. Gurney* (1852), 2 L. J. C. p. 21.

8. *Robertson v. Fauntleroy* (1828), 8 Moore 10.

A gives B a cheque on A's banker. The cheque does not operate as an assignment to B of money in the banker's hands belonging to A, and B has no right of action against the banker for wrongfully dishonouring the cheque.¹

A principal writes a letter authorising his agent to pay to A the amounts of certain acceptances, as they become due, out of the proceeds of certain assignments. A shows the letter to the agent, who assents to the terms of it. Before the acceptances fall due, the principal becomes bankrupt, and the agent pays the proceeds of the assignments to the trustee in bankruptcy. The agent is personally liable to A for the amounts of the acceptances as they become due.²

A bill drawn on an agent is made payable out of a particular fund, and the agent promises to pay the holder when he receives money for the principal. The agent is liable to the holder, if he subsequently receives the money.³

The acceptor of a bill pays money to a banker for the purpose of taking up the bill, and the banker promises to apply the money accordingly. The banker refuses to take up the bill, and claims to retain the money for a balance due to him from the acceptor. The drawer of the bill has no right of action either at law or in equity, against the banker to compel him to apply the money to the payment of the bill, there being no privity of contract between them.⁴ So, where an agent is authorised to pay a debt out of moneys in his hands, and there is no assignment of or charge on such moneys to or in favour of the creditor, the agent is not liable to the creditor, unless he expressly or impliedly contracts to pay him, or to hold the money to his use.⁵

An agent receives money for the express purpose of taking up a bill two days after its maturity. On tendering the money, he finds that holders have sent back the bill, protested for non-acceptance to their indorsers. He then receives fresh instructions not to pay. He is not liable to the holders of the bill, not having agreed to hold the money to their use.⁶ So, where an agent who was authorised to pay money to a third person, offered to pay on a condition to which such third person would not agree, it was held that that was not a sufficient agreement to render him liable to such third person.⁷

An agent of an executor wrote to a legatee stating and offering to remit the amount of his legacy, and subsequently remitted the amount, after deducting certain expenses. Held, that the agent had not contracted with the legatee,

1. *Schroeder v. Central Bank* (1876), 34 L. T. 735.

2. *Walker v. Rostron* (1842), 9 M. & W. 411.

3. *Stevens v. Hill* (1865), 5 Esp 247; *Langston v. Corney*, (1815), 4 Camp. 176.

4. *Moore v. Dushell* (1857), 27 L. J. Ex. 3.

5. *Williams v. Eversatt* (1811), 14 East 582.

6. *Stewart v. Fry* (1817), 1 Moore 74.

7. *Baron v. Husband* (1833), 4 B. & Ad. 611.

and was not liable to an action at his instance for the amount so deducted.¹

Public agents
not liable to
third persons
for money due
to them.

It has also been held under the English law that 'no public agent is liable or accountable to any third person, either at law or in equity, in respect of any money which as a public agent it is his duty to pay to such third person.'² This rule applies also to agents of foreign States.³ In *Kinloch v. Secretary of State for India*,⁴ booty was granted by the Queen to the Secretary of State for India in Council, in trust to distribute it to those who were found to be entitled thereto. Held, that he, being merely an agent of the Crown to distribute the fund, was not liable to account as a trustee to persons who were entitled to the booty.

88. Liabilities of agents in respect of wrongs committed on principal's behalf.

A servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action shall lie against a servant or a deputy, not *quatenus* a deputy or servant, but as a wrongdoer,⁵ although in such latter cases the principal may also be liable jointly with him under certain circumstances.⁶ Although a person who expressly authorised another to commit a tort is liable as fully as if he had himself committed the tort, the person who commits the tort cannot escape the liability for it by saying that he was acting as the agent of another.⁷ The rule under the English law is thus stated by Bowstead:⁸

"Where loss or injury is caused to any third person, or any penalty is incurred, by any wrongful act or omission of an agent while acting on behalf of the principal, the agent is personally liable therefor, whether he be acting with the authority of the principal or not, unless the authority of the principal justify the wrong, to the same extent as if he were acting on his own behalf.

"This Article applies to public agents: provided that they must be sued individually, and not in their official capacity; provided also, that no public agent is liable for loss or injury caused to a member, resident abroad, of any foreign State by any act outside the realm authorised or ratified by the Crown or Government."

Thus, where an agent signed a distress warrant, and after the warrant was issued, but before it was executed, refused a tender of the rent, it was held that the agent was personally liable for the illegal distress.⁹

1. *Barlow v. Brown* (1846), 16 L. J. Ex. 62.

2. Bowstead, Art. 129, p. 313.

3. (1882), App. Cas 619.

4. *Lane v. Cotton*, 1 Salk. 17. See also *Bonfield v. Gools. & Sheffield Transport Co.* (1910) 2 K. B. 94 C. A. *Clarke v. West Ham. Corp.*, (1909) 2 K. B. 858 C. A.

5. See notes on pp. 496 to 504, *supra*.

6. See *Underhill on Torts*; see also *Kear*, p. 685.

7. Art. 185, p. 331.

8. *Bennett v. Bayes* (1860), 29 L. J. Ex. 224.

The manager of a bank signed a letter, as such, falsely and fraudulently representing that the credit of a certain person was good. Held, that the manager was personally liable in an action for deceit.¹ All persons directly connected in the commission of a fraud are personally liable, though acting on behalf of others.² But, in the absence of fraud, an agent is not personally liable for misrepresentations made by him on behalf of his principal.³

The directors of a company negligently or knowingly⁴ pay dividends out of capital. They are jointly and severally liable to the creditors of the company.

An agent converts goods of a third person to his principal's use. He is liable to the true owner for their value, even if he acted in good faith and in the belief that his principal was the owner.⁵ If, in such a case, the owner elect to waive the tort, and proceed against the agent for an account, the agent is only liable to account for so much of the proceeds of the converted property as still remains in his hands, and not for what he has duly handed over in the course of his agency to the principal.⁷

An agent, on behalf of his principal but without the principal's authority, distrains the goods of a third person. The principal ratifies the distress, which is justifiable at his instance. The agent ceases to be liable, his act being justified by the ratification.⁸

The principal that there is no contribution among tort-faers applies equally to principal and agent who are co-judgment-debtors in an action for tort committed by the agent and neither of them can claim contribution from the other if he satisfies the judgment-debt.⁹ There is no agency among wrongdoers each of them being personally liable.¹⁰ The rule has, however, been very severely criticised by Lord Ellenborough C. J. in *Stephens v. Elwall*:¹¹ "What can be more hard than the common case in trespass, where a servant has done same act in assertion of his master's right that he shall be liable not only jointly with his master, but, if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it, and what is still more, that he shall not recover contribution."¹²

The rule of the English law on the subject is stated as follows:¹³—

"Where an agent has the possession or control, of goods, and—

Conversion
by, inuo cent
agent.

1. *Swift v. Jewesbury* (1874), L. R. 9 Q B 301.
2. *Cullen v. Thomson* (1862), 4 Macq. H L Cas. 424.
3. *Eaglesfield v. Londonderry* (1876), 39 L T, 303, H. L.
4. See *Doney v. Cory* (1901) A. C. 477.
5. *Re National Funds Ass. Co.* (1878) 10 Ch. D. 118.
6. *Perkins v. Smith*, (1752), 1 Wils. 328.
7. *Re Ely, Ex. p. Trustees* (1900), 48 W. R. 693, C. A.
8. *Hull v. Pickering* (1819), 1 B. & B 282.
9. Per Lord Ellenborough C. J. in *Stephens v. Elwall*, 4 M. & S. 259. See also *Merryweather v. Nixon*, 6 T. B. 186.
10. *Heugh v. Abernethy & Delves*, 23 W. R. 40 (Eng.).
11. 4 M. & S. 259.
12. See also notes on p. 507.
13. Bowstead, Art. 136, p. 324

(a) sells and delivers, or otherwise deals with the possession of and assumes to deal with the property in the goods, without the authority of the true owner; or

(b) refuses without qualification to deliver possession to the true owner on demand; or

(c) transfers possession to his principal or any other person except the true owner, with notice of the claim of the true owner—

He is guilty of conversion and is liable to the true owner for the value of the goods, even if he obtained possession from the apparent owner, and acted in good faith on the authority of the apparent owner. Provided, that this does not apply to acts done in good faith, and without notice of the claim of the true owner, within the meaning of the Factors Act, 1889. Provided also, that where a banker in good faith, and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title, or a defective title, thereto, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment.

But an agent is not guilty of conversions who, in good faith, merely—

(a) contracts on behalf of his principal to sell goods of which he has neither possession nor control; or

(b) by the authority of the apparent owner and without notice of the claim of the true owner, deals with the possession of without assuming to deal with the property in, the goods; or

(c) refuses to deliver to the true owner goods in his possession by the authority of the apparent owner in such terms that the refusal does not amount to a repudiation of the title of the true owner."

Thus, where an auctioneer was instructed to sell by auction furniture which the possessor and apparent owner had assigned by bill of sale to a third person, and the auctioneer, who had no notice of the assignment, sold the furniture at the residence of the assignor, and, in the ordinary course of business, delivered it to the purchasers, it was held that the auctioneer was liable to the assignee for the value of the furniture.¹

A obtained certain goods by fraud. B, a broker, bought the goods in his own name from A, thinking that they would suit C, a customer of his. B, having sold goods to C at the same price at which he had bought them from A, merely charging the usual commission, took delivery and conveyed the goods to the railway station, whence they were conveyed to C. The jury found that B bought the goods merely as an agent, in the ordinary course of his business. Held, that B was liable to the true owner for the value of the goods.² Anyone who

1. *Consolidated Co. v. Curtis* (1892), 1 Q. B. 495.

2. *Hollins v. Fowler* (1875), L. R. 7 Q. B. 616.

however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or for that of any other person, is guilty of a conversion, and it is no answer to say that he was acting on the authority of another person who himself had no authority to dispose of them.¹

A hired certain cabs from B, and obtained advances thereon from an auctioneer. The auctioneer, on A's instructions, and without notice of B's title, in good faith sold the cabs, and after deducting the advances and expenses, paid the proceeds to A. Held, that the auctioneer was liable to B for the value of the cabs having had control of them, and having sold them in such a way as to pass the property therein.² Otherwise, if he had not had possession or control of the cabs, and had merely contracted to sell without delivering them.³

A banker collects for, and pays over to a customer the amount of a post-office order to which the customer has no title. The banker is liable for the amount to the true owner.⁴

A banker collects a cheque, the indorsement to which has been forged, on behalf of a person who is not a customer of the bank, and who has no title to the cheque. The banker is guilty of conversion of the cheque and is liable to the true owner for the amount thereof.⁵ Otherwise, in the case of a banker who, in good faith and without negligence, collects a crossed cheque on behalf of a customer.⁶

A husband intrusted goods, which were the separate property of his wife, to an auctioneer for sale. The auctioneer received notice of the wife's claim, and subsequently sold a portion of the goods, and permitted the husband to remove the remainder. Held, that the auctioneer was liable to the wife for the value of the goods removed by the husband, as well as of those which had been sold.⁷

An agent in possession of goods by the authority of his principal, on demand by the true owner refuses to deliver them up without an order from the principal, or requires a reasonable time to ascertain whether the person demanding the goods is the true owner. Otherwise, where the refusal is absolute, or amounts to a setting-up of the principal's title to the goods.⁸

It has also been held under the English law that 'where an agent, with notice of a trust, deals with trust money or property coming to his hands in a manner or for purposes inconsistent with the trust, or is otherwise a party to the commission of a breach of trust, he is personally liable to the *cestui que trust* in respect of the money or property so dealt with, or for such breach of trust. But an agent who has no knowledge that a breach

Liability for
breach of
trust

1. *Hollins v Fowler*, *supra*; *Union Credit Bank v. Mersey Docks, etc.* (1899) 2 Q B. 205

2. *Cochrane v Bynill* (1879), 40 L. T. 744 C. A. *Barker v Furlong*, (1891) 2 Ch 173.

3. *Fine Art Society v. Union Bank* (1886), 17 Q B. D 705.

4. *G. W. Ry. v. L. & C. Bank*, (1901) A. C. 414; *Same v. L. & C.*, (1906) A. C. 187.

5. Bills of Exchange Act, 1882 (45 & 46 Vict C. 61), *Midland Bank v. Reckitt*, (1893) A. C. 1.

6. *Davies v. Artington* (1880), 49 L. J. Ch. 609

7. *Alexander v. Southey* (1821), 5 B & A. 247

trust is being committed is not personally liable merely because he acts, as agent, in a transaction which constitutes a breach of trust.¹ Thus, where a banker transfers trust money from a trust account to the private account of the trustee, He is liable to the beneficiaries for the amount so transferred whether he acquired any personal benefit from the transaction or not.² Otherwise, if the banker had no notice that it was trust-money.³ Similarly, an agent of an executor applies a fraud, which he knows to be part of the assets of the testator, in satisfaction of advances made to the executor for his own business. The agent is personally liable to account for the fund to the beneficiaries under the will.⁴

Agent not
liable for
wrongs of
co-agents or
sub-agents

As already noticed,⁵ to all intents and purposes, an agent who employs another without express or implied authority as his sub-agent, stands in the place of the principal as well as to third persons. The rules which apply to the liability of the principal for the tortious acts of his agent apply *mutatis mutandis* to the liability of the agent for the torts of the sub-agent. Where, however, the agent is authorised to employ the sub-agent the rule is different. No agent is liable, as such, to any third person for loss or injury caused by the wrongful act or omission of co-agent, not being his partner, or of a sub-agent, while acting on the principal unless he authorised, or was otherwise party, or privy to, such wrongful act or omission.⁶ Where the agent is authorised to employ the sub-agent, he is not liable for the neglect or wrongful act of the sub-agent, for it only the principal or the sub-agent being liable.⁷

¹ See Bowstead Art 137, p 328

² *Punnell v Hurley* (1845) 2 Colly 241

³ *Union Bank of Australia v Murray Aynsley* (1898) A C 693 P C *Bank of New South Wales v Goulburn Valley Butter Factory*, (1902) A C 543

⁴ *Wilson v Moore*, (1834) 1 Myl & K 127 337

⁵ See Chapter VIII

⁶ See Bowstead Art 138 p 329 and the authorities cited therein

⁷ *Stone v Cartwright*, 6 T R 411, *Dixon v Bitch*, L R 8 Ex 185, *Bear v Steienson* 30 L T 177 P C

CHAPTER XIII

LIABILITY OF THIRD PERSONS.

89. *Liability of third parties.*

89. Liability of third parties.

Generally a contract has only two parties whose rights and duties are determined by the general law of contract but where a contract is entered into through an agent, three parties become at once involved, namely, the principal, the agent and the other contracting party. The other contracting party in such case has two different persons in relation to whom his rights and duties are to be determined. He may be liable for his contract to the principal or to the agent or to both according to the circumstances of each particular case. The most important of the facts which cause material change in the liability of a third person with respect to the principal and the agent are the same which we have already noticed in Chapters XI and XII in connection with the liabilities of the principal and the agent to third persons, namely:—

- (1) When the principal is disclosed.
- (2) When the principal is undisclosed.
- (3) When the principal is a foreigner.
- (4) When the principal cannot be sued in a court of law.
- (5) When the agent has got a personal interest in the subject matter of the contract.
- (6) When there is a special contract determining the rights and liabilities of the three parties concerned either expressly or by necessary implication.
- (7) When the person contracting falsely represents himself an agent.

We shall recapitulate some of these here for facility of reference.

Where the principal is disclosed, *i. e.* when the third party knows that the agent is dealing on behalf of another person and not on behalf of himself, and makes a contract on the basis of this fact, his contract with the principal although through the instrumentality of the agent; the agent is neither entitled to enforce the contract nor is he bound for its due performance by the principal. He can neither sue nor be sued on such contract, his function ceasing with the making of the contract. (*See notes on pages 523 to 527*). Although in certain cases, as for instance for the breach of the warranty of authority he may be sued by the third person for compensation for any loss caused to him by such breach, when the latter finds that he cannot proceed against the principal, he has no corresponding right to sue for any incident of the contract in his capacity as agent unless he is specially authorised by the principal in that behalf. In such case he is liable to the

Liability of third persons when the principal is disclosed.

principal alone and not to the agent for the due performance of the contract. The same may be said as regards the other acts of the agent which in such case are also regarded as the acts of the principal, he alone being entitled to the benefits, and bound by the consequences, of such acts to the person with respect to whom such acts are done. In such cases the general rule laid down in section 226 of the Indian contract Act, 1872, applies. Here even though the agent acts without authority or exceeds the authority or acts for a fictitious principal or for a principal not in existence, he cannot himself claim the first of the act or the contract so done or made, although he is responsible for any loss which may result to the other contracting party from the fact that he cannot enforce the contract or claim the first of such act from the principal for the reason of the want of authority in the principal.¹ But the immediate parties to the contract being the agent and the other contracting party, they are always at liberty to contract to the contrary, and, in spite of the fact that the agent was acting as such, there may be special contract between him and the other contracting party holding and being held responsible by the principal¹ for the performance of such contract, they i. e. the agent and the other contracting party will hold each other responsible for such performance either to the total exclusion of the rights and liabilities of the principal therefor or holding and being held by him also responsible jointly or as an alternative with the agent. In such case the liability of the third party as well as the liability of the principal and agent will be determined by the terms of such contract. The mere fact that the agent is acting as *del credere* agent will not entitle him to sue or make him liable to be sued. The mere fact that the contract stands in the agent's name does not prevent the principal from being entitled to sue (See notes on pages 489 and 523 to 526).

Liability
when the
principal is
undisclosed.

Where a principal is undisclosed there is a presumption of the existence of a contract that the contract is binding and enforceable between the immediate parties to the contract, namely the agent and the other contracting party. The agent in such case is entitled to sue and be sued on it in the same way as if he had been the principal by virtue of this presumption.² The law, however, declares the principal also entitled to claim the performance of such contract, subject of course to certain conditions. The third party in such case can hold either the principal or the agent or both of them liable for the performance of such contract. Similarly, the law declares that either the principal or the agent can claim benefit of such contract, the former of course, subject to such equities as the third party would have been entitled to claim against the agent if the agent had been the principal. If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract: but the other contracting party has, as against

1. See *Katlar*, pp. 687 to 689. See also *Nirou Narain Singh v. Shahad Khan*, 52 I. C. 177; 89 I. C. 798.

2. See *Ranjidas v. Jankidas*, 39 Cal. 802; *South Indian Industrials v. Mndi* 52 I. C. 177; 89 I. C. 798.

the principal, the same rights as he would have had as against the agent if the agent had been principal. When one man makes a contract with another, neither knowing, nor having reasonable ground to suspect, that the other is an agent, the principal if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract (*see notes on pages 528 to 534 supra*; *see also Katiar, pp. 690, 691*).

Equities to which the third person is entitled are already dealt with on pages 522 and 538 and may be referred to.

As in the case of an undisclosed principal, so in the case where the principal is a merchant resident abroad and the contract made by the agent is contract for the sale or purchase of goods, the law makes a presumption of the existence of a contract entitling the agent to sue and making him liable to be sued for the contract made by him, or, in other words, the law presumes that the contract was entered into by the parties on the consideration that they will hold each other personally liable for the performance thereof (*see notes on pages 524, 527 and 528*). Unlike the English law on the subject (*see pages 524, 527 and 528*) the Indian law confines the presumption to the case where the principal is a merchant who lives abroad, which means that he does not live in British India, and the contract is a contract for the sale or purchase of goods. There will be no presumption if any of these conditions are not satisfied. This presumption is rebutted when the principal himself is made the contracting party in writing, and the contract is made directly in his name (*see notes on pages 524, 527 and 528*).

Principal
foreigner.

In England no foreign principal may sue or be sued on any contract made by a home agent unless the agent has authority to establish privity of contract between the principal and the other contracting party, and it clearly appears from the terms of the contract, or from the surrounding circumstances, that it was the intention of the agent and of the other contracting party to establish such privity of contract (*see notes on page 527*). In the absence of evidence to the contrary it is presumed that a home agent has no authority, to establish privity of contract between his foreign principal and third person. Where the principal is a merchant resident abroad and the contract is a contract for sale or purchase of goods for him, according to English law the principal cannot sue or be sued on such contract unless there are facts rebutting the presumption. It is only the agent who can sue and be sued on such contract. According to Indian law, in cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable. Out of the three cases in which according to the Indian Legislature there is a presumption of the personal liability of the agent, namely, (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad, (2) where the agent does not disclose the name of the principal; and (3) where the principal, though disclosed, cannot be sued, the restriction placed

on the principal's right to sue, subject to certain equities laid down by sections 231 and 232 of the Indian Contract Act, is confined to a case which covers only a part of the ground covered by clause (2) of section 230 of the Act, namely, where the other contracting party neither knows nor has reason to suspect that the person dealing with him is an agent. According to the Indian Legislature, in all other cases the principal can sue and be sued in the same manner and to the same extent as if he had himself made the contract. The phraseology used by the Indian Legislature in these sections is by no means satisfactory. The Legislature seems to take account of only the agent's liability to be sued personally on a contract made by him. This much is certain that in a case falling under clause (1) of section 230 paragraph 2, the other contracting party can sue the principal as well as the agent and can be sued by the agent. Whether he can be sued by the principal is a question not free from doubt. In the light of the sections 230 to 233 there appears to be no bar to such right of the principal but there are English cases to the contrary. It is highly desirable that on account of a large number of commercial dealings between this country and England, the law in both the countries should be made on the same footing (see *Katiar*, pp. 695 to 698, and also notes on pages 524, 527 and 528).

Liability of third person in cases where agent has a personal interest in the subject matter of contract.

In cases where the agent entering into a contract has an interest in the subject-matter of the contract it is only natural that he should be allowed to sue to safeguard such interest. So far as his interest in the contract is concerned the contract may be deemed to have been entered into by the agent in his personal capacity rather than in the capacity of an agent. Thus an auctioneer or commission agent who, unlike a mere servant or shopman, has possession of the goods and a lien on them for his charges can maintain an action on the contract against the purchaser while on the other hand he may be sued by the purchaser for non-delivery of the goods sold¹ (see notes on pages 526 and 527).

Special provision in the contract for determination of the rights and liabilities of the parties concerned

Where there is a special provision in the contract itself as to the manner and extent in which all the parties concerned or only such of them as the parties to the contract may choose to make will be liable, such provision will govern the rights and liabilities of all the parties concerned and in the manner provided for in the contract to the exclusion of all the rights and liabilities which in the absence of such provisions would have been available to the parties as legal incidents of such contract.² Where the contract was made in the following terms:—"It is mutually agreed between J. & R. W. of the one part and S. J. C. on behalf of G. & M. Ry. Co. of the other part etc. etc." signed "J. & R. W. and S. J. C.", it was held that S. J. C. was entitled to sue in his own name for breach of the contract

¹ See *Williams v. Millington*, 1 H. Bl 81, *Woolfs v. Horne*, 2 Q. B. D. 355;

² *Fishes v. Marsh*, 34 L. J. Q. B. 177; *Dickenson v. Naul*, 1 B. & Ad. 688.

² See *Katiar*, p. 700, citing *Robertson v. Wait*, 8 Ex. 299; *Harper v. Williams*, 4 Q. B. 419; *Agacio v. Forbes*, 14 Moo. P. C. 160; *Joseph v. Knor*, 3 Camp. 330.

as he had contracted personally.¹ So, where a broker contracted in writing in his own name to purchase goods the seller being told that there was a principal, and under a general authority from the principal contracted to re-sell them, but the principal in hearing of the last mentioned transaction refused to have anything to do with the goods to which refusal the broker acquiesced, and whereupon the seller refused to deliver the goods, it was held that the broker having contracted personally had a right to recover damages for the non-delivery and the principal's renunciation of the contract did not affect that right.²

For all trespasses and injuries committed by third persons to the agent personally in the course of his employment the agent may sue in his own name;³ and in a proper case, such as for personal injury to agent causing loss of service, the principal may also recover for the agent any damages resulting by such act of the third person.⁴ Thus one agent selling goods upon commission may recover damages from a third person for a libel upon him in reference to the subject-matter of his agency, by reason of which he lost customers and was deprived of the material gains and profits of the business.⁵ An agent like any other person may sue for damages against one who injures him by interfering in his relation between himself and his principal by bringing about his dismissal or reduction by some unauthorised acts.⁶ The mere fact that the principal can also recover is immaterial and does not bar the agent's right to sue⁷ unless the principal has already sued for the same cause of action.⁸

When agent may sue for injuries to himself.

The custody by a mere servant of his master's goods is ordinarily deemed to be so far the possession of the master as to give the servant no right of action against one who disturbs that possession,⁹ but where the party in possession of the goods is one to whom possession has been confided, and who is, therefore, responsible for them, or who, otherwise, has a special property or interest therein, as in the case of a factor, he may maintain an action in his own name against any person who wrongfully injures or converts the goods,¹⁰ even though such person may be the absolute owner of the goods himself.¹¹ As against all persons except the owner himself or persons claiming under him the agent can ordinarily recover the full value of the goods,¹² but as against the owner of persons claim-

When agent can sue for injuries to principal's property.

1. *Cooke v. Wilson*, 1 C B N S 153, *Clay v. Southern* 7 Ex. 717, *Brand v. Morris* (1917) 2 K B 794 O A.

2. *Shurt v. Spackman*, 2 H & Ad. 962

3. *Meehem*, 8. 3028

4. *Meehem*, 8. 2049.

5. *Weiss v. Whittemore*, 28 Mich. 366.

6. *Perkins v. Fendleton*, 90 Me. 160.

7. *Fisher v. Marsh*, 6 B & S. 411, *Kennedy v. Gourlet*, 3 D & B. 503

8. The cause of action is alternative and not joint, and it is therefore not ordinarily proper for the principal and agent to join as plaintiffs - *Meehem*, 8. 3024.

9. *Faulkner v. Brown*, 13 Wend. (N. Y.) 63.

10. *Moors v. Robinson*, 2 H A 817.

11. *Little v. Fossett*, 34 Me. 545.

12. *Ibid.*

ing under him, he can recover only to the extent of interest in the goods which are thus injured or converted.¹ Even where an agent is not in possession of the goods or property he may sue for recovery of such possession from one who wrongfully denies him the right to get possession if he can show that he is entitled to the immediate possession thereof. If the goods in such case are injured or wrongfully converted he can recover to the extent of the full value thereof against all persons other than the owner thereof or persons claiming under such owner, but as against the latter only to the extent of his special property or interest therein.²

Bar by recovery of judgment.

It is a fundamental rule of law that no man can be vexed twice for the same cause of action. Every breach of contract entered into by an agent as well as every wrongful injury to property in possession of the agent, or to the immediate possession of which he has a right as such, constitutes but one cause of action which accrues simultaneously to the principal as well as the agent in cases where the law allows it to accrue in favour of both of them according to the rules already discussed, except in those cases in which the agent besides being interested on behalf of his principal possesses also an interest or special property of his own in the contract broken or in the property injured. In the latter case, however, the interests of principal and the agent do not exactly coincide as in the former case. Hence a recovery of judgment in the former case by either of the two bars an action by the other, while in the latter case it does not unless it can be shown that the judgment recovered covers the interest of both.³

Liability of agent to repay to third person.

The receipt of money from a third person by an agent on his principal's behalf, does not in itself render the agent personally liable to repay it when the third person becomes entitled as against the principal to repayment, whether the money remains in the agent's hands or not. But if a third person pays money to an agent under a mistake of fact, or in consequence of some wrongful act the agent is personally liable to repay it, unless, before the claim for repayment was made upon him, he has paid it to the principal or done something equivalent to payment to his principal. Where however, the agent has been a party to the wrongful act, or has acted as a principal in the transaction, in consequence of which the money has been paid to him, he is not discharged from his liability to make payment by any payment over to his principal.⁴

Direction from principal to pay over to third person.

Where an agent is directed by his principal to pay to a third person any money which he has received or is about to receive on his principal's behalf, he is not in general responsible to the third person if he fails to do so, notwithstanding the fact that the money is received by him from the principal for the express purpose of paying it over to the third per-

1 *Little v Poasett*, 34 Me. 545.

2 See *Kattar*, p. 704 and the authorities cited therein.

3 *Ibid*, pp 704, 705.

4 *Halsbury*, Vol. I (2nd Edn.), Art 489, pp. 302, 303

son or that his failure to comply with the direction is a breach of a duty towards his principal. But he renders himself personally liable if he assents to the direction, and the assent is communicated to the third person, or if he enters into an unconditional undertaking to pay the money to the person or to hold it on his behalf. In this case he is not discharged from liability by the subsequent bankruptcy of the principal, or the purported revocation of his authority to pay.¹

If, however, the direction is not a mere authority to make the payment, but amounts to an assignment of a specific fund, or a charge upon it, the agent, upon receiving notice of the assignment or charge, becomes liable to the third person for the amount due to him thereunder. But the agent is not deprived thereby of any right of lien or set-off which accrued before he received such notice.¹

Direction
amounting
to assign-
ment or
charge

1 Halsbury, Vol I (2nd Edn), Art 490, p 309

CHAPTER XIV

TERMINATION OF AGENCY

90. Determination and revocation of agent's authority 91. Termination of agency by performance. 92. Termination of agency by efflux of time 93. Termination of agency on the happening of a contingency. 94. Termination by agency by mutual consent 95. Termination of agency by revocation of authority by the principal 96. Modes of revocation 97. Time from which revocation operates 98. When authority is irrevocable 99. Termination of renunciation of the business of agency by the agent 100. Termination of agency by death or incapacity of the principal or agent 101. Termination of agency by destruction or extinguishment of the subject-matter 102. Termination by the happening of any event which renders the agency unlawful

90. Determination and revocation of agent's authority.

Termination of agency

An agency is terminated by the principal revoking his authority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

(S 201, Indian Contract Act, 1872.)

Agency may thus be terminated either (1) by the act of the parties, or (2) by operation of law. The act of the parties may be either a revocation by the principal or a renunciation by the agent. The law terminates the agency - (1) on complete performance of the undertaking or (2) where either party becomes incapable of continuing the contract by reason of death or unsoundness of mind, or (3) by the bankruptcy of the principal. An agency may also be determined by mutual consent, or by the efflux of time for which the relationship was created, or by the happening of the contingency on the happening of which the parties had agreed that the relationship should cease to exist, or by the destruction of the subject-matter of the agency¹

91. Termination of agency by performance.

The agency is terminated by performance when the agent has done what he was employed to do, after which he is *functus officio*. Thus, a broker who has been employed to sell, after the sale has no power to alter the terms of the sale, for he ceases to be agent, or rescind it¹ In *Gillio v. Aberdare*,² the agent was authorized to do any one of the following things, (1) to let the house furnished, (2) to let it unfurnished for five years (3) to sell the ground lease. He did the first; after that he had no authority to do either of the remaining two; he had terminated the agency by performance, and could not negotiate or deal as to them, or earn any commission in respect to them. So a solicitor's authority, who has been employed to bring an action,

1. See Halsbury, vol. I, (2nd Edn), Art 496, p 309, Bowstead, Art. 139, p. 831

2. *Blackburn v Scholes* (1810), 3 Camp 341

3. (1892), 8 Times, (1893), 9 Times, 12.

ceases on obtaining judgment; though directions given to him as to the manner of enforcing it have the effect of continuing the authority.¹ An auctioneer is the agent of the man instructing him to sell, and when he has once sold the agency has terminated, and he cannot negotiate terms.² So an agency to obtain a loan ceases when the money is received by the borrower and all the requisite papers have been executed and delivered to the parties to the loan. Statements thereafter made by such agent do not bind the principal.³ So also, where an agent acts for both parties in negotiating a contract for the sale of goods, the agency terminates when the contract is signed by the parties and any notice to him or correspondence with him from one of the parties no longer binds the other.⁴ Where an agent was employed to find a purchaser for land at a fixed price which he did, it was held that thereupon his agency to the vendor terminated and he was at liberty to take the services of the vendee in attending to the due execution of the conveyance.⁵

Where the purpose for which the agency was created is accomplished by other means before the agent has acted, there is nothing left for him to act upon and his authority is, therefore, terminated.⁶ Where before one of the two agents separately authorised to sell land had found a purchaser the principal had effected a sale of the land to a purchaser produced by the other agent, it was held that the first agent's authority to sell was terminated by the sale.⁷

Where the end to be attained or the object to be accomplished requires continuous negotiations or is an enterprise not fully ended by a single act but requires a series of acts to complete it according to the intention of the parties and the usages of the business under similar circumstances, the authority of the agent does not cease with the performance of one act even though that act may be of prime importance.⁸ Thus it was held that an agency for the sale of goods does not cease with the receipt of the price of the goods by the agent in as much as under section 218 of the Indian Contract Act, 1872, the agent also owes a duty to the principal to account for the sum received by him and pay it to him.⁹

It must not however be supposed that in every case authority of an agent continues until the object of the agency is accomplished.¹⁰ That it is to so continue may be evident from the express terms of the appointment or from the

1. *Butler v. Knight* (1867), L. R. 2 Ex. 109.

2. *Seton v. Slade* (1802), 7 Ves. 264.

3. *Atlanta v. Saw Bank v. Spencer*, 107 Ga. 629.

4. *Groneberg & Schoentgen Co. v. Esten*, 144 Mo. App. 419.

5. *Short v. Millard*, 68 Ill. 292.

6. See *Mechem*, § 554.

7. *Akers v. Baker*, 34 Mich. 93.

8. *Mechem*, § 555; *Kirkcaldy, etc. Co. v. Furness R. Co.* L. R. 9 Q. B. 486.

9. *Rabu Ram v. Ram Dayal*, 12 All. 541; *Shibchandra Ray v. Chandra Narain Mukerjee*, 33 Cal. 719. See however *Yenkattachallan Chetty v. A. N. R. M. Narayanan Chetty*, 24 M. L. J. R. 140.

10. See *Mechem*, § 556.

surrounding circumstances, but on the other hand it may be equally clear that the authority is not to continue indefinitely merely because the accomplishment of the object is indefinitely delayed or postponed. Known changes in the conditions of the property to be dealt with or in its value may be significant and conclusive. The mere lapse of time may raise a presumption of termination which may become conclusive where the period elapsed is so great that no reasonable man could fairly believe that the parties still intend the authority to continue. In some cases, it would be a question of reasonable time. For instance, where a real estate broker is deputed to find a purchaser and has been promised a commission if he does so, this would only mean that he should find a purchaser within a reasonable time and could not be held to mean that the authority thus conferred would endure for an indefinite period until he could find a purchaser. Hence the lapse of a reasonable time, without the agent finding out a purchaser, would cause the authority to cease in such cases. In many other cases also, it would be evident that, though not expressly so declared, the authority was only to be executed in case the object ceased to be accomplished at once, or specially or concurrently with some other object¹

92. Termination of agency by efflux of time.

Where the relation of principal and agent is agreed to exist only for a particular period, the expiration of such period would operate to terminate the agency. This may be inferred either from the express language used or where it is not expressed in precise words, from the facts and circumstances of the case. "Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended"²

An authority given for a day terminates at the end thereof without any special notice.³ Where a broker is authorised to sell goods it may be shown that by the custom of the particular trade such an authority expires with the expiration of the day on which it is given.⁴ The authority of a stock-broker ends with the account day, unless continued.⁵ During the auction an auctioneer is agent for the purchaser, to put down his name as buyer, and sign a memorandum which will bind him, but as soon as the auction is over his authority ceases.⁶ Therefore, a memorandum signed by the auctioneer a week afterwards was held not binding on him the memorandum must have been signed either actually at the sale or immediately after⁶

1 See *Mechem*, § 556.

2 Per Mookerjee J in *Lalljee v. Dadubhai*, (1915) 23 Cal. L. J. 190, at p. 202—84 I O. 807.

3 *Dickenson v. Lithall* (1815), 4 Camp. 279.

4 *Lawford v. Harris* (1896), 12 Times, 275.

5 *Huckmaster v. Harrop* (1807), 13 Ves. 456.

6 *Brett v. Clowser* (1880) 5 C. P. D. 376.

Where a resident of Australia who possessed an estate in England executed a power of attorney to a firm of solicitors in England in which he recited, "Whereas I am about to return to South Australia and am desirous of appointing attorney to act for me during my absence from England in the care and management of the said _____ and generally to act for me in the management and dealings with any property belonging to me during my absence from England" and then proceeded with the operative part of the instrument to convey powers without any limitation as to time, it was held that the recital controlled the general language used in the operative part of the instrument and limited the exercise of the powers of the attorneys to the period of the principal's absence from England.¹

Where an agreement creating an agency for the sale of machines did not limit its duration to a particular period but provided that the principal would supply to the agent such number of machines as he may be able to sell as his agent prior to 1st October, 1897, it was held that a fair and reasonable construction of the agreement showed that it created an agency which was to continue only up to first day of October, 1897.² Where an agent is employed to do something which cannot necessarily be done at once, but for the carrying out of which immediate expenditure and labour by the agent is required the Court will ordinarily imply a term that the agent is to have a reasonable time within which to do that for which he has been employed.³

Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation for revocation by principal or renunciation by agent

(S. 205, *Indian Contract Act, 1872.*)

Thus "the principal is bound to make compensation to the agent whenever there is an express or implied contract that the agency shall be continued for any period of time. This would always probably be the case when a valuable consideration had been given by the agent."⁴ The valuable consideration here spoken of must be something more than undertaking the agency. Where A appointed B as exclusive agent for the sale of A's coal in Liverpool for seven years, and B undertook not to sell any other owner's coal there during that time without A's consent, this was decided by the House of Lords not to imply any condition that A should continue to keep his colliery during the term. "Upon such an agreement as that . . . unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as matter of

1. *Dunby v. Coutts*, L. R. 99, Ch. D. 500.

2. *Gundlach v. Fischer*, 100 Ill. 172; *Meehem*, 8 551.

3. *Jorden v. Ram Chandra Gupta*, 8 C. W. N. 881; See *Meehem*, 8s 555, 597 and 602.

4. *Per Cur.*, in *Vishvaacharya v. Ramchandra*, (1881) 5 Bom. 253, at p. 258.

obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent and the commission that he may receive."¹

In a case falling under the above rule the plaintiff is bound to claim a lump sum for future loss also, and it is not competent to him to break up his damages into annual instalments, and to bring periodical actions for their recovery. The measure of damages in such a case is the actual loss of commission which the agent would have earned during the remainder of the term,² and also loss of profits where profits could be earned.³

Neither the principal nor the agent can, however, compel the other for the continuation of the relationship even if the former revokes or the latter renounces the business of the agency before the expiration of the term for which such agency was created.⁴ Generally, the time limit in a contract of agency operates as a bar on the principal's power to revoke and on the agent's power to renounce the agency, entitling the other party to an action for damages for a premature revocation or renunciation, but there may be a case in which such conduct of the principal or agent, as the case may be may be justified by the exigencies of that particular case which may furnish a reasonable excuse for it.⁵

93. Termination of agency on the happening of a contingency.

It is also entirely competent for the parties at the time of creating the relation to provide for its termination, automatically or otherwise, upon the happening of certain events, or to reserve to one or to the other the right to terminate it, at particular times, or at any time, for causes specified or for any cause, upon conditions or without any conditions and a termination in performance of such a provision will be effective and will impose no liability upon the party exercising the right.⁶ But although it is entirely competent for the parties to make such stipulation, and a termination, in pursuance of such stipulation, entails no liability, yet the cause, stipulated for, must exist, and the notice required, if any, must be given.⁷ So, where the principal may terminate, if he desires to make a certain other arrangement, such condition must actually exist in order to justify a termination.⁸ A stipulation for a right to terminate for a certain cause implies the exclusion of a right to terminate for any other cause in the absence of a contract to

1. *Rhodes v. Forwood* (1876) 1 App. Ca. 256, per Lord Penzance at p. 272; Cf. *Official Assignee of Madras v. Frank Johnson Sons & Co.*, A. L. R. 1921 Mad. 65-128 I. C. 849.

2. *In Re Patent Floor Cloth Co., Dean and Gilberts Claim*, (1872) 41 L. J. Ch. 476.

3. *London & Sons v. Ahmed Ayub*, A. L. R. 1922 Sind. 23.

4. *Vishnucharya v. Ramchandra*, 5 Bom. 253. See also *Katkar*, p. 356 and the authorities cited therein.

5. As to what constitutes a reasonable excuse for principal, see *infra*.

6. *Mechem*, §. 556.

7. *Johnson v. Pacific Bank Pictures Co.*, 59 Wash. 88.

8. *Fuller v. Duening*, 120 App. Div. 86.

the contrary.¹ But a contract fixing no term for its continuance and, therefore, terminable at will, will not be rendered not so terminable merely because a provision is inserted by which it may be terminated in certain events. Such provision would not ordinarily be sufficiently indicative of an intention to agree that a contract, otherwise terminable at will, should be terminated only, in the case provided for, and would ordinarily be deemed to be only cumulative and inserted only by way of a further precaution.²

Termination By Some Act Of The Parties

94. Termination of agency by mutual consent.

Like every contract and every relation that arises by contract, a contract of agency and the relation of principal and agent created thereby, may be rescinded by the mutual consent of the parties. The parties who are at liberty to make any contract between them are also at liberty to unmake one already existing between them.³ So far as any authority depends upon the act of the parties as distinguished from authority created by law, the law has no purpose to sub-serve which will require the continuation of the relation, when both parties desire and agree that it shall be determined and the rights of third parties are not impaired.⁴ Such termination, however, will not be allowed, in any way, to prejudice the rights and interests of a third party, who can, in spite of such termination hold the principal or agent, as the case may be, liable for any transaction already made as if there had been no termination of the relationship.⁵

95. Termination of agency by revocation of authority by the principal.

The principal may, save as is otherwise provided by the last preceding section,⁶ revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal may revoke agent's authority

(S. 203, Indian Contract Act, 1872.)

Section 202 of the Indian Contract Act, 1872, prescribes that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest. 'Subject to this rule and to any other rule, which we shall note hereafter, the principal has full liberty to revoke the authority conferred by him at any time. Even the fact that the principal has expressly agreed that the agency shall continue for a certain period does not prevent his revoking the authority before the expiration of the period and all that the agent can claim by virtue of such stipulation is only such damages as he has sustained on account of such premature revocation.'⁷ Where a declaration that the authority

1. *Newcomb v. Imperial Life Insurance Co.*, 51 Fed 725.

2. *Wilcox Gibbs Co. v. Ewing*, 141 U. S. 627.

3. *Binnex v. Oehl*, 51 N. J. L. 47, *Conrey v. Brandegee*, 2 La. Ann. 132.

4. *Mechem*, §. 569.

5. See Katist, p. 363 and the authorities cited therein.

6. S. 204, Indian Contract Act, 1872, referred to at page infra.

7. *Frith v. Frith*, 1906 A. C. 254, 6 205, Indian Contract Act, 1872.

shall be 'exclusive' or 'irrevocable' refers only to the fact that it is given for a definite period and not to the fact that it is coupled with an interest or is given as a security, the authority is revocable in the same way and subject to the same conditions as the agent's claim for damages, as where it is given expressly for a fixed period. So the mere fact that revocation may be a breach of contract between the principal and the agent does not prevent the principal from exercising his right nor does it entitle a third party to charge the principal upon a contract made with the agent after knowledge of the agent's authority.¹

The fact, that the agent acting under a revocable authority has performed some service for which he is entitled to be remunerated or has incurred expenses for which he may claim reimbursement, or has subjected himself to a liability against which he may demand indemnity does not affect the revocability of the authority except in the cases where such authority is given as a security for all these claims of the agent.²

What amounts
to exercise of
authority

It is to be noted that section 203 of the Indian contract Act empowers the principal to revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal. What amounts to exercise of authority?

An agent authorised to purchase goods on behalf of his principal cannot be said to have exercised the authority so given to him "so as to bind the principal" if he merely appropriates to the principal a contract previously entered into by himself with a third party. Such an appropriation does not create a contractual relation with a third party, and the principal, therefore, may revoke the authority.³

Authority given to an auctioneer to sell goods by auction may be revoked at any time before the goods are knocked down to a purchaser,⁴ and authority given to a policy broker to effect a policy at any time before the policy is executed so as to be legally binding.⁵ Authority to pay money in respect of an unlawful transaction may be revoked at any time before it has actually been paid if it has been credited in account.⁶

Damages
payable to
agent

On the ground of agent's right to claim compensation in certain cases a distinction is made between the right to revoke and the power to revoke. In all those cases where the authority is not irrevocable the principal has power to revoke it, but not always, a right to do so. In those cases in which he does not possess the right as well, for reason of the exercise of the

1 See Katar, p 366 and the American authorities cited therein.

2 Ibid See also *Firth v. Firth*, supra, *Lepard v. Vernon*, 13 R. R. 13, *Raleigh v. Atkinson*, 55 R. R. 761; *Smart v. Sanders*, 75 R. R. 849.

3 *Lakshmichand v. Chotooram*, (1900) 21 Bom. 403.

4 *Warlow v. Harrison* (1859) 1 E. & E. 309; *In re Hare & O'More's Contract* (1901) 1 Ch. 93.

5 *Warwick v. Stale* (1811) 3 Camp 127, *Op Thompson v. Adams* (1889) 33 Q. B. D 361.

6 *Edger v. Fowler* (1803) 3 East, 222; *Taylor v. Bowers* (1876) 1 Q. B. D 291; *Hastelton v. Jackson* (1828) 3 R. & C 221.

power being prejudicial to the rightful interests of the agent, he must be mulcted with damages for his wrongful exercise of such power. The same result has been arrived at in certain other cases by distinguishing between the authority and the contract of employment. The authority may be withdrawn at any moment but the contract of employment cannot be terminated in violation of its terms without making the principal liable in damages.¹

95 Modes of revocation

Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Revocation and renunciation may be expressed or implied

ILLUSTRATION.

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority

(S. 207, Indian Contract Act, 1872.)

Means by which authority may be revoked are as various as the methods by which it may be conferred. It may be revoked by a solemn instrument under seal or by writing not under seal or by a public and formal announcement or proclamation or by a simple and private declaration. Revocation of authority may also be inferred from circumstances. It need not be couched in any formal phrase and even the use of the word revoke or other similar words is not necessary. A request to resign may amount to a revocation or discharge and so may a demand by the principal to return the written power under which the agent was acting and its surrender or withdrawal.² On the other hand, a request to resign under circumstances showing that the employer desired a resignation but did not mean to force it has been held to be insufficient to effect revocation.³

Revocation may also be implied where something has been done or has happened which makes the further continuance of the authority inconsistent or incompatible with the present situation of affairs. For instance, where the authority conferred upon one agent has been subsequently conferred upon another under such circumstances that the former has been left nothing to be done by him it generally operates as a revocation of such authority.⁴

Revocation may be implied if the agent is afterwards authorised to deal with the subject matter in an entirely different capacity; as where an agent authorised to sell land is subsequently made trustee to hold it for the benefit of a third person⁵ or where the principal subsequently authorises an act inconsistent with the execution of the first power, as where an

1. See Katlar, p. 387 and the authorities cited therein.

2. See Katlar, p. 379 and the American authorities cited therein.

3. *Reiter v. Standard Soule Co.*, 141 Ill. App. 427.

4. *Copeland v. Mercantile Ins. Co.*, 5 Pick. (Mass.) 198 *Schafer's Estate*; *Keyl v. Westenhause*, 42 Mo. App. 49.

5. *Chenault v. Quisenberry*, 56 S. W. 410.

agent authorised to get a suit dismissed is subsequently authorised to continue it.¹

A revocation or discharge may also be implied where the principal substantially reduces the rank, radically changes the nature of the parties or insists upon the performance of materially greater or more onerous services as compared with the rank duties or services contemplated by the original contract of employment.² Not so however, where the change is immaterial, casual, or such as may fairly be deemed to have been within the terms of the employment.³

An intention to revoke power is ordinarily implied where the principal, before the execution of the authority by the agent, disposes of the subject-matter upon which the authority was to operate. For instance, if a principal authorises an agent to sell his real estate or his interest in a patent but before the agent has found a purchaser, the principal sells the same himself, there is nothing left to support the agency and, question of notice not being involved, revocation will be implied.⁴

Where a firm or corporation which has appointed an agent is subsequently dissolved the dissolution will ordinarily operate as a revocation of the power. A mere change in the name of the firm, however, where the new firm is composed of the same members and the identity remains the same, does not operate to effect revocation.⁵

Where an agent is employed jointly by two or more persons for the transaction of some business in which they are jointly interested, a severance of such joint interest will operate to revoke the agency.⁶

The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

(S. 210, *Indian Contract Act, 1872*)

As a general rule this is obvious. There may be cases where a substitute rather than a sub-agent has been appointed, and there appears by express agreement or by the nature of the case an intention that his authority shall not be determined when that of the original agent is revoked.⁷ Where a sub-agency is created in the belief that the original contract will be subsisting during the period which the sub-agency is to be in force the cancellation of the original contract terminates the sub-agency.⁸

1. *Ather v. Taylor*, 62 S. W. 990.

2. *Meechem*, § 617.

3. See *Katrai* pp. 990, 991 and the American authorities cited therein.

4. *Ibid.* See also *Sutton v. New Boston Cycle Co.*, (1900) 1 Ch. 43, *Brace v. Calder* (1896) 2 Q. B. 253, *Meechem*, § 620.

5. *Evans v. Rand*, 111 Ind. 908.

6. *Story on Agency*, §. 469. See also §. 194, *Indian Contract Act, 1872*.

7. *Gopalswami v. Chidambaram*, 3 L. W. 411.

It is already noted the revocation need not necessarily be by formal instrument. A deed may be revoked by word of mouth, or the principal may intervene in the course of negotiations but until some such action of the principal is taken the agent is justified in assuming the continuance of the agency. Section 205 of the Indian Contract Act, 1872, however, prescribes as follows:—

"Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other."

Notice of
revocation
where neces-
sary.

The phrase "such revocation or renunciation" should not be taken as referring back to section 205 and it is arguable that what the draftsman meant to say is that when there is no express or implied contract that agency should continue for any fixed period reasonable notice must be given of the revocation or renunciation of the agency etc.¹

A pleader cannot divest himself of his duty arising by the acceptance of the *vakalatnama* without the leave of the court after reasonable notice to the client of withdrawal from the case so as to afford the client an opportunity of obtaining other legal assistance.²

An authority given by two or more principals jointly may be determined by notice of revocation or renunciation being given by or to any one of the principals.³ If the authority is joint and several, revocation by one principal will only determine the authority which he himself has given.

The English law on the subject is thus stated by Bowstead:⁴

"Subject to the provisions of Articles 140 and 141, the authority of an agent, whether conferred by deed or not, is determined by the principal giving to the agent notice of revocation at any time before the authority has been completely exercised, or by the agent giving to the principal notice of renunciation; but without prejudice to any claim for damages that the principal or agent may have against the other for breach of the contract of agency. Where the authority is conferred by two or more principals jointly, it is sufficient if the notice

1. See Halsbury, Vol. I, (2nd Edn.), Art 505, p 313.

2. *In the matter of Shaw Wallace & Co*, A I R. 1931 Cal. 678 = 134 I. C. 899.

3. *Emperor v. Rajani Kant*, 49 Cal. 732.

4. *Bristow v. Taylor* (1817) 2 Stark 50; see however *Kirtynaud v. Ramchand*, A. I. R. 1936 Pat 456=164 I. C. 220, where *Bristow v. Taylor* supra was distinguished on the ground that the agency in that case was for an indefinite period. In the case cited it was for a fixed period of three years and the appointment of a joint manager was clearly part of the terms of the contract of the joint owners inter se.

5. *Montendra Lal Chatterjee v. Hari Podd*, A. I. R. 1933 Cal. 660 = 166 I. C. 608.

6. Art 144 & 141

of revocation or renunciation be given by or to any one of the principals."

An indenture of lease provided that an agent therein named should have authority to receive the rent on behalf of the lessor, and that his receipt should be a sufficient discharge, during the term thereby granted. Held, that the lessor might revoke the authority during the term, the agent having no interest in the rent.¹ An authority, though given by deed, may be revoked by a verbal notice of revocation.²

An auctioneer is authorised to sell certain goods by auction. His authority may be revoked by the principal at any time before the goods are knocked down to a purchaser.³ So, where a broker is authorised to buy or sell goods, the authority may be revoked at any time before the contract of purchase or sale is completed, and where writing is necessary, even after he has verbally contracted to buy or sell the goods.⁴

An agent undertakes to endeavour to sell a picture, and it is agreed that he shall receive remuneration only in the event of a sale. His authority may be revoked after endeavours by him to sell the picture.⁵

Money is deposited with A, to be applied for the use of the poor. The authority may be countermanded at any time before the application of the money, and the money be recovered by the principal from A.⁶ So, money received by an army agent from the Crown at any time before it has been paid to the officers, or the agent has contracted to hold it to their use, though he may have carried it to their credit in his books.⁷

Money is deposited with a stakeholder to be paid to the winner of a wager. The authority of the stakeholder may be revoked at any time before he has actually paid over the money to the winner and if he pay it over after notice of revocation he is personally liable to the depositor for the amount.⁸ So, where authority is given to pay money in respect of an unlawful transaction, the authority may be revoked at any time before the money has been paid over, if it has been credited in account.⁹

A authorised his banker to hold £ 20 at the disposal of B. The authority of the banker may be countermanded, provided

1 *Venning v Bray* (1862), 31 L J Q B 181. And see *Downard v Williams* (1890), 6 T. L. R. 318.

2 *The Margaret Mitchell* (1858), Swa 382; *R v Wait*, (1828), 11 Price 518.

3 *Warlow v Harrison* (1859), 1 E & E 809. *Ex. Hare and O'Neil's Contract*, (1901) 1 Ch. 93.

4 *Farmer v. Robinson* (1806), 2 Camp 338, n.

5 *Campanari v. Woodburn* (1854), 15 C. B. 400.

6 *Taylor v. Lendey* (1807) 9 East. 43.

7 *Brummell v. M'Pherson* (1824), 5 Russ. 263.

8 *Hampden v Walsh* (1878) 1 Q. B. D 189; *Shoolbred v. Roberts* (1900) 2 Q. B. 497; *Burge v. Ashley*, (1900) 1 Q. B. 744.

9 *Edgar v. Fowler* (1903), 3 East 323.

that he has not paid the money to B, nor contracted with him to hold it on his behalf.¹

What shall be deemed sufficient notice in any case, and how it shall be given, are questions concerning which it is not possible to lay down any general rule. To all persons who have had actual dealings with the agent involving the giving of credit in reliance upon the existence of the authority either actual notice must be given or such knowledge of the fact must be brought home to them as would be sufficient to put an ordinary prudent man upon inquiry. To persons who have had no such actual dealings notice may be given by publication in some newspaper of general circulation in the place in which the business is carried on. Notice by publication is sufficient even in the case of those who had dealings with the agent if it can be shown that they actually received it, otherwise not.²

Form of notice.

A notice of revocation need not be in any particular form but it must be clear and unequivocal. It need not come directly from the principal but it must at least come through an apparently authentic channel, so as to fairly put the other party on enquiry. Where notice of revocation is required by any law for the time being in force in any particular form or through any particular means that form and means alone will be sufficient even if it never reaches the knowledge of the person concerned as he is bound to know the law and must always look for information of revocation through that means and in that form.

Whatever form is adopted it should be unequivocal and certain as to the principal's intentions and should not leave the parties concerned in doubt about it. Any ambiguity or uncertainty must always be construed most strongly against the principal whose power it lay to prevent such results. Of course, in all the cases where existence of authority is admitted, but the principal relies on its revocation, the burden of proof of such revocation and its proper notice to the other party lies on him and he should establish both those facts by a clear and cogent evidence.³

96. Time from which revocation operates.

The termination of authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

When termination of agent's authority takes effect as to agent, and as to third persons.

ILLUSTRATIONS.

- (a) A directs B to sell goods for him, and agrees to give B 5 per cent commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for Rs 100. The sale is binding on A and B is entitled to five rupees as his commission.
- (b) A, at Madras, by letter, directs B, to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and

1. *Gibson v. Minet* (1824), 9 Moo. 31.

2. See Katiar, p. 386 and American authorities cited therein.

3. *Ibid.*

directs B to send the cotton to Madras. B, after receiving the second letter, goes into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which he absconds. C's payment is good as against A.

- (a) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

Story also states the rule thus:¹

"Revocation by the act of the principal takes effect as to the agent from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before."

The rule under the English law is thus stated by Bowstead:²

"Where a principal, by words or conduct, represents, or permits it to be represented, that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the determination of the authority otherwise than by the death or bankruptcy of the principal, to the same extent as he would have been if the authority had not been determined with respect to any third person dealing with the agent on the faith of any such representation, without notice of the determination of his authority."

It is to be observed that except as to illustration (c) above which removes an anomaly, section 208 of the Contract Act is in accordance with the common law. When A trades as B's agent with B's authority (even though the business be carried on in A's name, if the agency is known in fact), all parties with whom A makes contracts in that business have a right to hold B to them until B gives notice to the world that A's authority is revoked; and it makes no difference if in a particular case the agent intended to keep the contract on his own account.³

Illustration (c) follows the rule of the Roman Law and systems derived from it against the English authorities, which are admitted to be unsatisfactory⁴. Accordingly an acknowledgment of a debt made by an agent, though after the death of the principal, binds the estate of the principal provided the creditor has no knowledge at the time of the death of the principal and the acknowledgment amounts to a 'reasonable step (taken by the agent) for the protection and preservation of the assets of the principal within the meaning of S. 209 of the Contract Act.'⁵

If the authority of an agent to admit execution of a document is revoked before the registration thereof but, such

1. Story on Agency, §. 470

2. Article 145, p 843

3. *Trueman v Loder* (1840) 11 A & E 589.

4. In England the principal's estate is not liable on the contract, but perhaps may be liable for actual loss *Dixon v Nunn* (1879) 4 Q B. D. 616; *Blades v. Fryer* (1829) 9 B. & C. 167; but the agent is liable on implied warranty of authority; *Fonge v Tonyben* (1910) 1 K B. 215 C. A. Nor can the agent recover agreed remuneration from the principal's estate for service in the business of the agency performed after the principal's death; *Companari v Woodburn* (1854) 15 U B 400—See Pollock & Mulla, pp. 566, 567.

5. *Ebrahim Haji Yakkub v. Chunhal*, (1911) 35 Bom. 802=10 I. C. 888.

revocation is not known either to the grantee of the document or the registering officer, the document is not invalidated, though it is registered by the agent after the revocation of his authority.¹

The revocation of the authority of an agent may take effect, in so far as third parties are concerned, at a point of time different from the moment when it takes effect with regard to the agent himself. As to the agent himself the revocation takes effect from the time, when it is made known to him, and, as to third persons, when it is made known to them and not before; and until revocation is so made known it is inoperative. If known to the agent, as against his principal his rights are gone, but as to third persons who are ignorant of revocation his acts bind both himself and his principal. Where one has been the agent constituted and accredited to carry on business for another, his authority to bind the principal continues after actual revocation as to those who have been accustomed to deal with him as such agent, until notice of revocation of his agency is brought home to them². Where person acted as an agent in a series of transactions, unless the authority is so expressly revoked to the knowledge of the other party to the contract, the agent would be presumed to have acted as such in subsequent transactions with that party.³ So a payment by a debtor to his creditor's agents though made after termination of the agency is valid as against the creditor provided the debtor made the payment without notice of the termination of the agency.⁴

On the same principle, if the implied authority of a partner in a mercantile firm to draw and accept bill on behalf of the firm has been expressly cancelled but such cancellation is not brought to the knowledge of the discounting banks, the discounting banks are entitled to recover against the other partners.⁵

As regards third persons, express or or actual notice is not necessary; it is sufficient to establish that the persons had knowledge that the authority of the agent had been revoked. The burden of proof is on the principal to establish that the third persons were aware of the revocation of the agent's authority.⁶

97. When authority is irrevocable.

Where the agent has himself an interest in the property which forms the subject matter of the agency, the agency cannot,

Termination of agency where agent has an interest in subject-matter.

- 1 *Mohendra Nath v Kali Prasad*, (1902) 80 Cal 265. The Lahore High Court held in *Mosses v. Administrators General of Bengal* (1921) 8 Lah L. J. 265, that the manager of a distillery was empowered under the section to enter into contracts for the purchase of molasses after the death of the proprietor. If it was within his ordinary authority and he had not heard of the principal's death, one fails to see what there was to report. Pollock & Mulla, p 567.
- 2 *Dasrath v Brojo Mohan*, 18 Cal. L. J. 621, 626, 627.
- 3 *Ma Byaw v My Tun*, 1934 Bang 341=158 L. C. 321.
- 4 *Narasimha Pillai v Mathurani Natchar*, 7 M. L. J. 218.
- 5 *Narasimha Pillai v Mathurani Natchar*, 7 M. L. J. 218.
- 6 *Mohi Lal v. Union Commercial Bank*, 1930 P. C. 238=126 L. C. 428, *Dasrath v. Brojo Mohan*, *supra*.

in the absence of an express contract, be terminated by the termination of such interest.

ILLUSTRATIONS

- (a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.
- (b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton and desires B to sell the cotton, and to repay himself out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

(S. 202, *Indian Contract Act, 1872.*)

In these cases the current phrase is that the agent's authority is "coupled with an interest." In England, however, this does not seem to be quite accurate, unless it is understood that the word "coupled" implies, beyond the mere fact of the agent having an interest in the subject matter, some specific connection between the authority and the interest. The principle is thus stated: "that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable."¹ In fact, the circumstances must be such that revocation of the authority would be a breach of faith against the agent. The language of S. 202 of the Contract Act is wider.² Still there is not any evident intention to overrule the English decisions. In fact illustration (b) supplies just the circumstances which, in a leading English case where the authority was held to be revocable, were wanting, namely, that the consignment is made after the factor's advances, and with an express request by the principal to repay himself out of the price of the goods. In that case the court said: "We think this doctrine—i. e., the rule of the present section—" applies only to cases where the authority is given for the purpose of being a security, or . . . as a part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and incidentally only; as, for instance, in the present case the goods are consigned to a factor for sale. This confers an implied authority to sell. Afterwards the factor makes advances. This is not an authority coupled with an interest, but an independent authority, and an interest, subsequently arising. The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable but such an effect will not, we think, arise independently of agreement.³ The material variation of the facts in this case which is given in illustration (b) does amount to evidence of agreement. Whether there is such an agreement in a particular case is a question of

1 *Smart v. Sanders* (1848) 5 C. B. 895, at p. 897, approved in *Thplin v. Florence* (1851) 10 C. B. 744, repeated by Williams J in *Clerk v. Laurie* (1857) 2 H. & N. 199, 200; adopted by Lindley L. J. in *Carmichael's Case* (1896) 2 Ch. 643, 648.

2 See *Pollock & Mulla*, p. 560.

3 *Smart v. Sanders* (1848) 5 C. B. 895, at p. 918. And see *Frith v. Frith* (1906) A. C. 254.

fact.¹ Indian decisions, as we shall presently see, take the same line. The Act itself is, of course, the primary authority.²

The English law on the subject is thus summarised by Bowstead:³

"Where the authority of an agent is given by deed, or for valuable consideration, for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest. But it is not irrevocable merely because he has an interest in the exercise of it, or has a special property in, or lien for advances upon, the subject-matter thereof, the authority not being given expressly for the purpose of securing such interest or advances.

"Where an agent is employed to enter into any contract, or to any other lawful act involving personal liability, and is expressly or impliedly authorised to discharge such liability on behalf of the principal, the authority becomes irrevocable as soon as the liability is incurred by the agent.

"Where an agent is authorised to pay money on behalf of his principal to a third person, the authority becomes irrevocable as soon as the agent enters into a contract, or otherwise becomes bound, to pay or hold such money to or to the use of such third person.

"Where an agent has a right to sue on a contract made on behalf of his principal, and would be entitled, as against the principal, to a lien on any money or property recovered in respect of such contract or any breach thereof, the authority of the agent to sue and give a discharge for the money or property recoverable in respect of such contract or breach thereof, is irrevocable during the subsistence of the claim in respect of which he would be entitled to such lien.

"An authority expressed by this Article to be irrevocable is not determined by the death, lunacy, unsoundness of mind, or bankruptcy of the principal, and cannot be revoked by him without the consent of the agent."

A direction by A to B to receive income payable to A, and apply it towards discharge of A's debt to Z, is obviously not an authority coupled with an interest in B, whether the revocation of it would or would not be a breach of any contract between A and Z; but in such circumstances loosely worded or ambiguous new instructions from A to B will not be readily construed as a revocation.⁴

An example of a transaction including such an agreement as the rule requires is that of an "underwriting contract" address-

1. *De Comas v Frost* (1865) 3 Moo P. C. (N. S.) 158.

2. See 17 Bom. 520, at pp. 543, 545, 20 Mad. 97, at p. 103.

3. Art. 140, p. 332.

4. *Clerk v Laurie* (1857), 2 H. & N. 192, argued mainly on the question whether the authority was revocable, but decided on the ground that in any case there was nothing amounting to revocation.

sed to the vendor, promoter of a new company. Here we have a bargain by which, for valuable consideration in the form of commission, the underwriter agrees to take certain shares, and this he knows to be for the benefit of the promoter, who is to be paid out of money raised by the issue of shares, and in order to enable the promoter the better to secure the performance of the contract the underwriter authorises the promoter to apply for shares in his name, and expressly agrees not to revoke that authority. The authority is coupled with an interest, and an allotment of shares to the underwriter on the promoter's application entitles him a member of the company notwithstanding any attempted revocation in the meantime.¹

Indian authorities

Where an agent is authorised to recover a sum of money due from a third person to the principal and to pay himself out of the sum so recovered the debts due to him from the principal, the authority cannot be revoked as the agent has an interest in the subject matter of the agency.² Where a person is entitled to be maintained out of some property, he has a clear interest in the rents of that property before and after the grant to him of power of attorney for collection of rents. Such power of attorney cannot be cancelled if the conditions for its cancellation are not complied with.³ But the mere arrangement that the salary of an agent to collect rents should be paid out of the rents collected by him would not give the agent an interest in the subject matter of the agency,⁴ nor does a prospect of remuneration which an agent has in effecting a sale,⁵ or an agreement under which an agent is entitled to retain part of the price of the goods sold as his remuneration,⁶ prevent the termination of the agency. A vendee retaining part of the price to pay off incumbrances is an agent with interest of the vendor.⁷

As already noted in an earlier Chapter,⁸ an agent may enforce contracts if personally interested. Where an agent enters into a contract as such, if he has an interest in the contract he may sue in his own name. But unless the contract for the breach of which the action is brought is one made by the agent he has no cause of action, because there is no privity between himself and the defendant.⁹

Spiritual benefit conferred by religious endowment upon an agent does not amount to interest within the meaning of section 202 of the Contract Act. Agency created by an ordinary power of attorney for the management of an endowment can be revoked even though the endowment is made for the

1. *Carmichael's case* (1896) 2 Ch. 643, 647.

2. *Pestonji v. Matchett*, 7 B. H. C. A. C. 10; See also *Jogabhai v. Rustonji* (1885) 9 Bom. 311; *Chew v. Lewis*, 2 H. & N. 199, cited above would have resembled these cases if the debt which the banker was directed to pay had been due to himself and not to a third person.

3. *Chatter v. Kundan*, 1932 Mad. 70—34 L. W. 786.

4. *Vishnucharya v. Ram Chandra*, 5 Bom. 253.

5. *Lakshmi Chand v. Chokorah*, 24 Bom. 403.

6. *Dalchand v. Hazarimal*, 1932 Nag. 34—136 I. C. 878.

7. *Subbai Row v. Parakkal*, A. I. R. 1943 Mad. 152.

8. See notes on p. 523.

9. *Subrahmanya v. Narayanan*, 24 Mad. 130.

spiritual benefit of the person creating the endowment and the members of the family including the agent.¹

Where a mortgagee under a mortgage by deposit of title-deeds is put in possession so as to appropriate the profits in lieu of interest, he may be regarded as having received authority from the mortgagor to manage the lands and to receive rents and profits in lieu of interest. Such authority, being given in consideration of the loan to the mortgagor, cannot be terminated until the loan is paid off.²

The question has often arisen as to whether a factor who has made advances as against goods consigned to him for sale has such an interest in the goods consigned as to prevent the termination of his authority to sell. The result of the cases appears to be that the authority of a factor to sell is in its nature revocable, and the mere fact that advances have been made by him, whether at the time of his employment as such or subsequently, cannot have the effect of altering the revocable nature of the authority to sell, unless there is an agreement express or implied between the parties that the authority shall not be revoked.³ Where the factor is expressly authorised to repay himself the advances out of the sale proceeds, as in illustration (b), he has an interest in the goods consigned to him for sale, and the authority to sell cannot be revoked. In such a case "an interest in the property" is expressly created. But the "interest" need not be so created, and it is enough to prevent the termination of the agency that the "interest" could be inferred from the language of the document and from the course of dealings between the parties. Thus where a factor who had made advances as against goods consigned to him for sale was authorised to sell them "at the best price obtainable", and in the event of a shortfall to draw on the consignor, it was held that this arrangement gave an interest to the factor in the goods, and that the authority to sell could not be revoked.⁴

Factors for sale of goods.

The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation where authority has been partly received

ILLUSTRATIONS

- (a) A authorises B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.
- (b) A authorises B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

(S 204, Indian Contract Act, 1872)

The rule above laid down is connected with the principal's duty to indemnify the agent.⁵ "If a principle employs

1. Govindoss Krishnadoss v. Gopeaswar, 1940 Mad 231--121 I C 598

2. Shue Lon v. Hia Gywe, 47 I. C 138

3. Jafferbhey v. Charleswain (1893) 17 Bom 520, 522 citing *De Coman v. Prost* 3 Moo. P. C. 158, 179

4. *Kondappa v. Narasimulu* (1896) 20 Mad. 97.

5. See S. 202 of the Indian Contract Act, cited at p. 449

an agent to do something which by law involves the agent in a legal liability"—or even in a customary liability by reason of usage in that class of transactions known to both agent and principal—"the principal cannot draw back and leave the agent to bear the liability at his own expense."¹ There is no conclusive English authority really covering the ground, but Lord Lindley states it as the better opinion that "an agent who has already acted on his instructions, and has thereby incurred a legal obligation to third parties, is not bound on the command of his principal to stop short and refuse to perform the obligation incurred. There is no doubt that, as between himself and his principal, an agent is entitled to obey the counter order, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry out the instructions on which he has begun to act as may be necessary to relieve himself from all the legal liabilities incurred before notice of the countermand, and, having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions."² Conversely, if a principal revokes his agent's authority to carry on an enterprise, and the agent nevertheless carries it on and contrary to expectations makes a profit, the principal cannot then ignore his own revocation and claim the profit.³

Authority
coupled with
an obligation.

Where a person authorises another to bet for him and if he loses the bet to pay it out of the former's money remaining in the latter's hand, the authority becomes irrevocable as soon as the bet is made if the latter would incur the loss in his business or suffer eventual damage in the event of the bet remaining unpaid.⁴ Similarly, where an agent is authorised by his principal to pay to a third person the proceeds of a certain sale to which the agent assents and promises such third person that he will pay him or that he will credit the sum to his account, the authority is irrevocable and is not revoked by the principal's bankruptcy.⁵ It is immaterial that such third person is indebted to the agent and the latter retains the proceeds against such debt.⁶ The agent becomes bound by his promise to pay the proceeds or money entrusted to him by his principal and the third person to whom such payment is directed by the principal and is promised by the agent can enforce it in a court of law.⁷

It is to be observed that the agent can bind the principal only by obligations incurred by him prior to the notice of re-

1. *Read v. Anderson* (1894) 18 Q. B. D. 779, at p. 783, *per* Bowen L. J. The question whether undoubted principal was rightly applied in this case by the majority of the Court, having regard to the statute law, which is not material here, was cut short by the Gaming Act, 1892.
2. *Lindley on Partnership*, 10th ed., 447.
3. *Haridar Prasad Singh v. Kesho Prasad Singh*, A. I. R. 1925 Pat. 68--93 I. C. 454.
4. *Read v. Anderson*, 18 Q. B. D. 779.
5. *Crowfoot v. Gurney*, 9 Bing. 372; *Walker v. Boston*, 9 M. & W. 411; *Hutchinson v. Heyworth*, 9 A. & E. 375.
6. *Dickinson v. Marwood*, 14 M. & W. 718.
7. *Griffin v. Weatherby*, L. R. 3 Q. B. 753; *Hodgson v. Anderson* 8 B. & C. 842; *Ananthachari v. Mrs. Ramm and others*, 1918 Mad. 718.

revocation and not by those incurred subsequently thereto. So, where the defendant instructed the plaintiff by a letter to buy some cotton for him, but soon after the receipt of this letter the plaintiff received a telegram from the defendant revoking the order contained in the letter, the plaintiff however, in spite of this telegram appropriated to the defendant a contract which he had made on his own behalf and for his own benefit, saying that the contract was entered into by him before receiving the telegram, it was held that the telegram operated as revocation of the order, conveyed by the latter and that the plaintiff had no such interest in the subject-matter of agency as to prevent its revocation in as much as no contractual relation with any third person involving any obligation had been entered into by the plaintiff for the defendant before the receipt of the telegram.¹ Similarly, where the defendant requested the plaintiff to sell for him plot of ground and agreed to give him as remuneration half of the profits he would make by such sale but before the plaintiff could find a purchaser the defendant revoked this authority it was held that the plaintiff could not compel the defendant to make good a contract of sale of such land subsequently entered into by him as his authority had ceased; nor could he claim half of the profits which the defendant had made by his sale by other means subsequent to the revocation.²

It is also to be noted that the distinction of 'interest' and 'obligation' herein noted is not universally observed in English law and both classes of cases are treated as the same. This does not effect the result in as much as in either class of cases the agent becomes interested in the property which forms the subject-matter of agency, although the nature of interest in the two classes of cases is different. Where there is an obligation the interest of the agent is to save himself from liability to third persons, which he has incurred by part performance of the authority by his further dealing with the property which forms the subject-matter of agency. Besides that the interest of a third person to whom such liability is incurred by the agent is also involved. The interest, however, in the second class arises not by the agreement creating authority but subsequently to it when the agent deals with the property in pursuance of such authority, while the interest in the first class is that created by the agreement itself. In the ordinary case, involving mere agency, in which a principal has directed his agent to do some act for the benefit of a third person, as for example to pay money or deliver property to him, the agent himself, until he has, in pursuance of the direction, assumed some obligation to the third persons, could usually have no such interest in the execution of the authority as would prevent the principal from revoking it. If, however, before revocation, he had assumed such a liability, then in accordance with the rules already considered, he would have an authority coupled either with an interest or with an obligation, which would prevent revocation.³

1. *Lakshmichand v Chotooram*, 24 Bom. 408.

2. *Hurst v. Watson*, 2 Bom. H. C. R. 423.

3. See *Katjar*, p. 396.

Authority and interest must emanate from the same source.

It is also to be remembered that in either class of cases it is necessary that 'authority' as well as 'interest' must emanate from the same source; otherwise, if 'interest' is derived from one person and 'authority' from another coupling of such authority with such interest does not affect its revocability unless such persons are so connected with one another that one can attribute the act of the one to the other.¹ In fact in the latter class of cases the 'obligation' or 'interest' arises from the 'authority' itself by due performance of it according to the terms of the contract of agency or subsequent directions of the principal himself. Where, however, the act done by the agent creating the obligation is not in pursuance of the principal's authority or directions but in pursuance of the directions of somebody else, the obligation thus incurred does not render the principal's authority irrevocable unless that some body else was acting for the principal with his authority or was so connected as to render his acts the acts of the principal. So, where the first mortgagee authorised the second mortgagee to sell the property mortgaged and apply the proceeds for payment of his debt, it was held that such authority was not irrevocable by reason of the interest in its exercise acquired by the second mortgagee in as much as the sources of 'interest' and 'authority' were not the same, the authority having been derived from the first mortgagee while the 'interest' was derived from the mortgagor.²

Express language as to irrevocability.

Where the authority is otherwise revocable, it is not rendered irrevocable by a mere stipulation in the contract of agency that it shall not be revoked.³ Where, however, the authority is irrevocable by its nature for the reason already considered, a stipulation to the effect that it shall be revocable is effectual.⁴ But for authority to be irrevocable it is not necessary that there should be an express language to that effect in the contract of agency itself. As stated by Marshall C. J. "Where a letter of attorney forms part of a contract, and is a security for money, or for the performance of any act which is deemed valuable, it is generally made irrevocable in terms or if not so, is deemed irrevocable in law".⁵ An express stipulation however, would always be appropriate and in a doubtful case might be conclusive.⁶ So, where the agent has authority to confess judgment as security for a debt, or to collect a debt and out of the proceeds to reimburse himself for advances made by him to the principal or for debts due to him from the principal,⁷ or to sell real or personal property and apply the proceeds to re-pay himself,⁸ or where the authority is given for a valuable consideration or forms part of a contract and is given as a security for the performance of such contract,⁹ or

1. See *Mechem*, § 563.

2. *Black v. Harsha* 7 Kan. App. 701.

3. See *Mechem*, § 565.

4. See *Oregon Bank v. American Mfg. Co.*, 36 Fed. 22.

5. Per Marshall C. J. in *Hunt v. Boussanier*, 5 L. Ed. 589.

6. *Norton v. Whitehead*, 84 Cal. 263.

7. *First Nat. Bank v. Sears* 188 Ill. App. 122.

8. *Pestonji v. Matchett*, 7 Bom. H. C. R. 10.

9. *Gauvain v. Morton*, 19 W. & A. C. 731.

10. *Re Hannans, Express, etc. Co.*, 1896, 2 Ch. 643.

where it is conferred to enable the agent as for instance, a factor, to reimburse himself for prior advances,¹ or where it is given to indemnify a surety or indorser against loss,² or where in reliance upon it the agent has assumed responsibility or incurred an obligation on the principal's account,³ the authority is irrevocable although there is no stipulation to that effect in that contract or agreement creating such authority. Of course, where authority is given by way of security, the principal is at liberty to revoke it, if he pays off the debt or reimburses the agent of the liability incurred by him or otherwise satisfies the obligation for which the security was given.⁴

99. Termination by renunciation of the business of agency by the agent.

As already noted, an agency is also terminated by the agent renouncing the business of the agency,⁵ though reasonable notice must be given of such revocation or renunciation, failing which the damage thereby resulting to the principal must be made good by the agent. Also, renunciation may be expressed or may be implied in the conduct of the agent.⁶ Where the agency is indefinite in duration the agent may, upon giving reasonable notice, sever the relation at any stage without liability to the principal⁷ and will be entitled to compensation and reimbursement for his services and legitimate expenses up to that time.⁸ Where, however, the agency was created for a definite period, or the accomplishment of a particular was undertaken for a valuable consideration, the agent who renounces before the expiration of that period or before the performance of his undertaking without sufficient cause will be liable to his principal for the damages the latter may sustain thereby.⁹ Action for damages is, moreover, the only remedy for the breach of the contract ordinarily for it is well settled, as a general rule, that courts will not undertake to enforce the specific performance of contracts for personal service, or interfere by injunction to prevent their breach.¹⁰ In certain cases, however, by reason of the peculiar circumstances, the remedy by the award of damages may not be adequate and the party may suffer irreparable loss if no other remedy be afforded. For instance, where the services stipulated for are unique, individual, peculiar, not capable of being adequately replaced, and the difficulty of estimating the actual loss which the employer will suffer is great, in such cases while a court will not undertake to compel specific performance, it may, certainly where the contract contains certain negative covenants

1 *Smart v Sanders*, 5 C B 895

2 *Hynson v Noland*, 14 Ark 710

3 *Read v Anderson*, 10 Q B D 100

4 See *Meehan*, § 585

5 See §§ 201, 205, and 207 of the Indian Contract Act, 1872, cited at pp 592, 595 and 599

6 *Barjans v Cushman*, 37 Mich 481

7 *Meehan* § 641 and § 1573

8 *Ibid* See also *Rajaram Nandlal v. Imdul Rahim*, 30 I C 450 (Sindh)

9 See *Kumar*, p 400 and the American authorities cited therein See also *Chinn v Sainsbury* 30 L J Ch 409

not to be employed by others and, according to a large number of American authorities, even without them, if the fair construction of the contract implies such covenants, interfere by injunction to prevent the party employed from serving another in violation of his agreement with the complainant. Where there is no mutuality of contract, i. e. where the principal is free to revoke the relation at any time he pleases but the agent is bound down by a covenant restricting his right of renunciation, whether, in such case, the court should interfere by an injunction the breach of such covenant by the agent, is a question on which the authorities are sharply divided, and the reasons given by the exponents of either view in their support are by no means flimsy or insignificant. It is urged on behalf of those who deny such remedy to the principal, that the relief by specific performance or injunction to restrain breach, is not a matter of strict right but of sound discretion, and that it is unreasonable and unfair to restrain the agent from accepting other employment where the principal may later, and possibly when the agent cannot find other employment, discharge him by virtue of the right reserved. It is replied on the other hand, by those who favour the view giving such remedy to the principal, that the court is but simply enforcing the contract as the parties made it, and if there are any such inequities they are such as the parties themselves have created. So unless the contract is on the whole inequitable the mere fact that the agent has not reserved as efficient a remedy against the principal as he has given the latter against himself, is no reason why the contract should not be enforced according to its terms so long as it remains in force. Although the weight of authority seems to be with the latter view, the remedy by injunction being an equitable remedy only, always discretionary with the court and which cannot be claimed as of right, the former view is as much appealing and has generally been found to prevail in cases where the loss suffered by the principal by such breach is not extraordinarily great and is nearly capable of being met adequately by an award of damages, while the loss which the issue of injunction would cause to the agent would be beyond all proportion to his fault.¹

Form of renunciation

Like revocation, renunciation may also be express or implied.² No particular form is necessary. It may be effected by a mere abandonment of the business of agency which, subject to the principal's right to claim damages for the loss he sustains thereby by reason of its being premature or inopportune or without notice, is as much effectual as a formal renunciation.³ If the agent abandons the business of the agency he has no cause of complaint, if the principal treats this as renunciation and appoints another in his stead.⁴ Even an involuntary abandonment entitles the principal to this right. For instance, where an agent was arrested upon a criminal charge and kept in jail for two weeks during the busiest part of the season,

1 See Kassar, pp 402, and the authorities, mostly American, cited therein

2 S 207, Indian Contract Act, 1872

3 See Mechem, s. 646.

4 *Stoddart v. Key*, 64 How Pr (N. Y) 137

it was held that the principal might lawfully treat this as abandonment of employment, although it is subsequently proved that the imprisonment was unauthorized.¹ Absence from duty on the ground of mere illness or other unavoidable cause, however, does not amount to abandonment.²

Where there is an express or implied contract that the agency should be continued for any period of time, the agent must make compensation to the principal for any previous renunciation of the agency without sufficient notice.³ Reasonable notice must be given of such renunciation, otherwise the damage thereby resulting to the principal must be made good by the agent.⁴ Thus, a pleader cannot divest himself of his duty arising by the acceptance of the *Vokalatnama* without the leave of the court after reasonable notice to the client of withdrawal from the case so as to afford the client an opportunity of obtaining other legal assistance.⁵

Principal's right to claim damages for agent's renunciation of agency.

In such a case the agent must make good the loss sustained by the principal.⁶ The agent is also responsible for any loss which results to the principal by reason of the part execution of his authority and renouncing it before completion. If the agency is purely voluntary and gratuitous, the principal is not entitled to any damages for its non-execution. Where, however, it is partly executed and the principal sustains loss by the non-execution of the rest or by the execution of the part without finishing it, even a volunteer acting without any renunciation cannot escape liability for the loss. So also even a volunteer or gratuitous agent cannot on that ground escape liability for the loss which the principal may sustain by reason if the agent renouncing the business of agency without a reasonable notice to allow him reasonable time to arrange his affairs according to the new situation. The Indian Law does not recognise any distinction between a gratuitous agent and an agent receiving remuneration, as between a fraudulent omission and an omission made in good faith.⁷

Honeste vivere is a part of the law of principal and agent. An agent may therefore lawfully renounce his agency without being liable for any damages if the principal requires of him the performance of any illegal or unlawful act.⁸ He is also justified in doing so if the principal is guilty of any misconduct or default against him and the fact that the agency is created for fixed period or for the accomplishment of a particular purpose does not prevent him from doing so in such case.⁹ For instance, where the principal refuses to pay the agent his remuneration or indemnity without any sufficient

When the agent may lawfully renounce.

1. *Leopold v. Sulkey*, 31 Am. Rep. 93.

2. See *Mechem*, S. 646.

3. S. 203, Indian Contract Act, 1872

4. *Ibid*, S. 206.

5. *Emperor v. Rajani Kanta*, I. L. R. 49 Cal. 732

6. *Mechem*, Ss 641 and 649.

7. See *Katkar*, pp. 404, 405 and the authorities cited therein.

8. *Courey v. Barandegae*, 2 Ia. Ann. 132.

9. See *Rajaram Nandlal (firm of) v. Firm of Abdul Rahim*, 31 I. C. 450; *Katkar*, p. 405 and the American authorities cited therein.

cause,¹ or uses brutal and unexcusable language² or physical violence³ against the agent, the latter is justified in renouncing the agency or even abandoning it without any previous notice.⁴

Reasonable notice is necessary to be given by the agent to the principal and the other parties concerned of the information of such renunciation so that they may be able to arrange the business to meet the new situation created by such renunciation and thus to protect them from loss which might otherwise result therefrom.⁵ No formal notice, however, is necessary where the principal is advised of such renunciation in time in any other way.⁶ As in the case of revocation, notice of renunciation takes effect against the principal as well as against the third persons from the time they receive notice of such renunciation for otherwise come to know of it,⁷ but as to the agent it becomes operative from the time he has launched such information for the principal. So letter abandoning the agency is, as to the agent, operative from the time of posting it.⁸ Notice is required to be given by the agent to third persons only in those cases where his change of attitude may affect his relations to them or where want of notice may cause some loss to them in connection with the transactions already entered into with the agent which could otherwise be avoided.⁹ As the principal as well as the agent both may be held responsible to third persons for such loss, it is also the duty of the principal, for his own protection to give notice to third persons of the termination of the authority by renunciation in the same manner as where the authority is revoked.¹⁰

Termination By Operation Of Law.

100. Termination of agency by death or incapacity of the principal or agent.

The relation of principal and agent presupposes the existence of two parties, the principal's capacity to enter into a contract, his business capacity as well as the agent's capacity to be able to do the business of agency entrusted to him. The relation therefore comes to an end when either party dies or either the principal or in some cases the agent becomes incapacitated by reason of his lunacy or unsoundness of mind or by bankruptcy.

Except where the authority is irrevocable by the act of the principal during his life time for the reasons already recorded, namely, where it is coupled with an interest in or an obligation as regards the property which forms the subject-matter of agency, it always comes to an end instantly on the death of the principal and any attempted execution of it after that event is not

Termination
by death of
the principal

1. *Larry v. Hill*, 49 L. J. Ch 551.
2. *Cady v. Raynaud*, 1 Colo. 272.
3. *Bishop v. Renney*, 59 Vt. 316.
4. *Dunn v. Crickfield*, 214 Ill. 292.
5. See *Mechem*, §. 649.
6. See *Mechem*, §. 641.
7. *Mechem* §. 640.
8. *Cape v. Pacific Mut. Ins. Co.*, 64 Am. Dec. 412.

binding upon the heirs or representatives of the deceased.¹ It makes no difference that the power is declared in express terms to be irrevocable, for if it is not coupled with an interest, although irrevocable by the party, it is revoked by his death.² So, a power of attorney to an agent to present a document for registration is revoked by the death of the principal. It was accordingly held by the Privy Council that where the principal died before the presentation and the registrar, knowing of the principal's death, accepted and registered the document, the registration was invalid.³ As soon as a client dies, a pleader has no standing in respect of that client and his power of attorney is terminated automatically.⁴ A solicitor purporting to act for a non-existing party is personally liable to pay costs of the other party to the suit.⁵ Where a decree-holder who has given a power of attorney dies, it is not possible to prosecute the execution on behalf of the legal representative of the deceased decree-holder without a power of attorney from the legal representative himself.⁶ But an agency on behalf of a joint Hindu family is not terminated with the death of the Karta who employed the agent.⁷

In England cases where the appointment of an agent had been made by a firm have presented difficulties when one member of the firm subsequently died. It has been held that death of one of the partners does not *ipso facto* terminate the agency, but the scope of the agency and the business for which the agent was employed are material factors.⁸ Consequently courts in India have been unable to hold as an inflexible rule of law that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent, not merely as regards the deceased but also as regards the surviving principal. In such a case the true intention of the parties to the contract has to be gathered from the terms thereof and from the surrounding circumstances.⁹ On the death of one of two joint agents the agency does not terminate so far as regards the surviving agent.¹⁰

Where a principal promised to pay an agent £ 100 if he succeeded in selling a picture and the agent succeeded in doing

1 See Katar, p. 408, and the authorities cited therein. See also Howstead, At 142, p. 337.

2 *Mitchell v. Eads*, 125 A 125.

3 *Mujid-U'n-Nissa v. Abdur Rahim*, (1900) 28 I A 15=23 All 283.

4 *Mat. Radhabai v. Mangia*, 1934 Nag. 274=153 I A 251.

5 *Dhanrajgiri v. Payne & Co.*, 58 Bom 1.

6 *Mat. Karn Bibi v. Mehr Ali*, 1933 Lah. 876.

7 *Shankar Lal v. Toshan Pal*, 1934 All 553.

8 *Taskeer v. Shepherd*, 6 H & N 576; *Phillips v. Hull Athambia Dolace Co* (1901) 1 K. B. 59.

9 In re *Sital Prasad*, 1917 Cal 436=-41 I C 288, *Monindra v. Haripadda*, 1936 Cal. 860, death of one of the joint and several principals, old agency terminates and a new agency under the heirs of the deceased principal springs up; *Ponnusami v. Chidambaram*, (1918) Mad. 279, Joint *Mittakashra* family agent, death of a member does not affect the agency which continues not only under the surviving co-partners but also under the heirs of the deceased co-partner *Agarwal Joravarmal v. Karam*, 1937 Nag. 314.

10 *Bhagirath v. Premchand*, 16 I C. 852; See also *Raghunath v. Luchmondas*, 36 I. C. 278.

so after the death of the principal, it was held that the sale was not binding on the representatives of the deceased principal but they could ratify it if they chose to do so. But, unless they had also ratified the original contract with the agent, by mere ratification of sale they were not bound to pay to the agent the £100 as commission but only such remuneration as was reasonable and proper for the services performed. So, where a stock broker had a running account with his client who died, but the stockbroker failing to get instructions from his representatives carried over the transaction in haste and selling them on or before the settling day and ultimately disposed of the shares at a loss, it was held that the representatives were entitled to stand by the carrying over of the sale on the first settling day after the death and that the broker was liable for the subsequent loss.

Exceptions.

All these cases, however, where authority is irrevocable, not for the reason of a mere covenant to that effect in the contract of agency, the breach of which only renders the principal liable to damages, but because it is coupled with an interest or obligation or is conferred by a statute which provides special conditions for its termination among which death is not included also, form exceptions to this general rule. So, also, if before the principal's death, the authority has been executed in part, his death cannot operate as a revocation of the executed portion; nor even of that which yet remains unexecuted if the authority is entire from the portion which remains unexecuted without prejudice to the parties concerned.

Effect of want of knowledge

Section 3 of the Powers of Attorney Act, 1882, provided that any person making or doing any payment or act in good faith in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act, the donor of the power had died or become lunatic or insolvent or had revoked the power, if the fact of the death, etc., was not at the time of the payment or act known to the person making or doing the same.

The act of an agent done in good faith in ignorance of the death of the principal, is binding upon his representatives. Section 203 of the Indian Contract Act, 1872, provides that the termination of the authority of an agent does not so far as regards the agent take effect before it becomes known to him, or so far as regards third persons before it becomes known to them.

Agent's authority after principal's death.

Even after the death of the principal the agent of a business man has authority to enter into transactions which are necessary or reasonable for the protection and preser-

1. *Foster v. Barr* (1928) 12 M. & W. 226.

2. *Compagnie v. Woodburn*, 15 Q.B. 400.

3. *Re Overseas Bank v. Durant* (1900) 1 Ch. 209.

4. *See Kellar*, p. 410.

5. *Ibid.*

6. See Illustration (c), annexed to that section, printed at p. 604. See also *Kellar*, pp. 412, 413.

ration of the interest of the heirs of the deceased, and such authority is continued, till it is revoked by the heirs. A person who enters into a contract with an agent after the death of his principal with knowledge of that fact is estopped from subsequently impugning the transaction on the ground of want of authority of the agent.

On the death of the principal an agency is terminated and a new agency is created if the agent continues in service of his principal's heir. So also would be the case where one of the joint and several principals dies and the agent continues to be employed on the same terms as before under the legal representatives of the deceased principal.

New agency created if agency continues.

The law is the same as regards the termination of authority by insanity of the principal as it is as regards his death. If a principal would become insane that should or might operate as a suspension or revocation of the authority of his agent during the continuance of the insanity; for the party himself, during his insanity, could not personally do a valid act and his agent cannot by virtue of a derivative authority, do any act for and in the name of his principal, which he could not lawfully do for himself. The rule is subject to the same exceptions as that regarding death and ignorance of the fact of insanity has the same effect as in the case of death.

(b) Termination by insanity of the principal.

It is to be observed that the effect of the insanity of the principal is to suspend the authority for the time being. If on the recovery of the principal he manifests no will to terminate the authority it may be considered as a mere suspension, and his assent to acts done during the suspension may be inferred from the forbearing to express dissent when they come to his knowledge.

Again, as already pointed out, the termination of the authority does not so far as regards the agent, take effect before it becomes known to him, or so far as regards third persons before it becomes known to them. This rule is applicable to termination by insanity as well. So, where third persons in good faith, relying upon the apparent authority and in ignorance of the principal's insanity, have given valuable consideration, they will be protected, where the contract is fully executed, was fair and reasonable, and the parties cannot be restored to their original situation. The liability of the lunatic in such cases is upheld not on the ground of the contract but on the fact that the lunatic has received and enjoyed an actual benefit from the contract. Where the principal, while sane, has expressly accredited an agent to the third person,

1. *Mowjee v. Ad. Gah*, 1921 Luhl 48-49 I. O. 789
2. *Madhusudan v. Rakhal Chandra*, 43 Cal. 248, *Ter. Bikaner Khetor v. Jadoo*, 40 C. W. N. 245, *Nabin Chand v. Chandra Madhub*, 44 Cal. 1.
3. *Monindra v. Haripada*, 1935 Cal. 620-156 I. O. 608.
4. See Story, §. 481.
5. See *Dugg v. Nan*, 4 Q. B. D. 661
6. *Davis v. Lane*, 10 N. H. 156.
7. §. 208, Indian Contract Act, 1872.
8. *Mathieson Mc Mohun*, 88 N. J. L. 356.
9. *Ibid.*

the latter will be protected if he continues to supply goods to the agent while he has notice of insanity.¹

(c) Termination by bankruptcy of the principal.

When a person is adjudged insolvent all his property of whatever kind becomes vested in the receiver or official assignee and he becomes incapable of entering into a contract in respect thereof. The bankruptcy of the principal operates as a revocation of the authority of his agent touching any right or property of which he is divested thereby. The bankrupt, thereby, ceases to be the owner and is consequently incapable of passing any title to it, and the act of his agent cannot have a higher validity.²

The mere insolvency or mobility of the principal, to pay his debts, when due, however, will not have this effect. "In India termination of authority takes effect from the time when the principal is adjudged insolvent."³ The rule of American Law that the legal bankruptcy of the principal, or his general assignment for the benefit of creditors, operates to revoke the authority of the agent for the transaction of the principal's business affected by the bankruptcy or assignment seems to apply to India.⁴

When a person employs another to collect money and remit it to him, the latter stands in a fiduciary relation towards the former, and may, in respect of the money, be regarded as a trustee, and consequently the money collected is held by the latter for a specific purpose and does not pass at his bankruptcy as the bankrupt's property.⁵

This rule also is subject to the same exceptions as the preceding rules concerning termination by death or insanity or revocation in general. The authority to do a merely formal act in completion of a transaction already binding on the principal is not affected by an adjudication of insolvency which takes place subsequently to the transaction but before its completion by such formal act.⁶ Where an agent by a power of attorney was given an authority to execute an endorsement of sale on the register of a ship when she returned home, it was held that the power was not revoked by the bankruptcy of the vendor the act being merely formal one which the principal, though a bankrupt, might have been compelled to do.⁷

Also, the general rule that the termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him or so far as regards third persons before it becomes known to them seems to apply *mutatis mutandis* to a termination by the principal being adjudicated insolvent as well. Adjudication of insolvency, however is a notice against the whole world¹ and it is doubtful whe-

1 *Dixon v Nunn*, 1 Q B D 661

2 See Bowstead, Art. 143 p 393, *Katkar* pp 416, 416

3 See S 20, Indian Contract Act, 1872; *Kohlanji v Bank of Madras*, 39 Mad 693

4. See *Katkar*, p 416

5 *Alliance Bank of India v Amritsar Bank*, 79 P. R 1915-81 I C 215

6 *Dixon v Ewart* 1817 Buck 94

7 See S 11, Indian Evidence Act, 1883

the want of notice can be pleaded as a ground of protection after such adjudication.

When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

(a) Agent's duty on termination of agency by principal's death or insanity.

(S. 209, Indian Contract Act, 1872.)

In *Anand Behari v Dinshaw & Co.*¹, it was held that the accountant of a bank on the verge of liquidation could not pray the section in aid as a justification for selling bank property after the death of the director of the bank. It had been urged that this was the only way in the circumstances to obtain ready cash for carrying on the bank's business. So, even after the death of the principal the agent can enter into transactions necessary to protect the interests of the heirs of the deceased and such authority continues till it is revoked by the heirs.²

An authority conferred on an agent is usually personal and if the agent dies it ceases to exist and does not devolve on his heirs.³ So, where an agent holds property simply as agent, the agency is terminated by his death and the right to the possession of such property does not pass to his personal representatives.⁴ Where, however, the authority is coupled with an interest in the property which forms the subject matter of the agency and is therefore irrevocable it survives the death of the agent to his personal representatives and heirs so far as it is necessary for the effective enjoyment of such interest. For instance, the power of sale conferred upon a mortgagee is not revoked by his death, but may be exercised by his representatives or assigns.⁵ Where instead of a natural person, an artificial person such as a firm of partners or a corporation is constituted the agent, the dissolution of such artificial person which amounts to its legal death would ordinarily terminate the agency.⁶ So also, where authority is conferred on two or more persons to be exercised by them jointly as in the case of joint agents, death of one of them renders the further exercise of the agency, as contemplated, impossible and it is, therefore, terminated.⁷ Where, however, the agency is joint and several or several execution is otherwise authorised the death of one agent does not terminate the authority of the other surviving agents.⁸ In such a case where one of the joint agents dies, upon his death the agency terminates only so far as he is concerned but continues as regards the surviving

(b) Termination of authority by the death of the agent.

1 A. I. R. 1942 Oudh 417=200 I. C. 485

2 *Musaji Ahmed & Co v Administrator General of Bengal* 80 I. C. 739 see also *Ebrahim Haji Yakub v Chunital Lalchand Kabie* 35 Bom. 302

3 S. 201, Indian Contract Act, 1872

4 *Tyson v George's Creek Coal & Iron Co* 115 Md. 564

5 *Collins v Hopkins* 7 Iowa 469 See also *Shue Lan v Hia Ghee*, 47 I. C. 183

6 *Lasson v Newman*, 19 N. D. 163

7 *Hartford Fire Ins. Co v Wilcox*, 57 Ill. 180

8 *Wilson v Stewart* 5 Penn. L. J. R. 150

agents. Even in the case of joint agents, since the sole requiring joint execution is based upon the presumed intention of the principal, the authority of the surviving agents is not terminated by the death of any one of them. After the death of one the principal presumes the continued existence of the agency of the survivors. So a power coupled with an estate in several or a power in trust to several would not ordinarily be terminated by the death of one.

Where the agent has appointed a substitute or sub-agent without direct authority and for his own convenience merely or in exercise of a right of substitute expressly given by the principal, the death of the agent annuls the authority of the sub-agent or substitute. Where, however, the sub-agent, though appointed by the agent, derives his authority directly from the principal, it will not be affected by the death of the agent.

(f) Termination of authority by the agent.

Although, as has been already pointed out, capacity of a person to contract is not a condition precedent to his being appointed as agent, and a principal, if he chooses to do so, can appoint a minor or even a lunatic or person of unsound mind as agent, yet the capacity of a person to do acts of agency is, generally, a predominant consideration in a contract constituting the relation which the principal always takes into account when he enters into such relation. If a person, engaged as agent while he is of sound mind, afterwards becomes insane or loses his soundness of mind, so as to render him incapable of discharging the duties for the performance of which he was engaged, his authority, being no longer capable of execution by him, ceases or is suspended for the time being. Insanity of one of two or more agents has the same effect on the authority of the rest as the death has on the authority of the survivors. The authority of the substitute is also similarly affected as in the case of death. An estate or interest in the property which forms the subject-matter of agency prevents the relation from cessation so far as such interest is concerned also in the same way and to the same extent in the case of insanity of the agent as in the case of his death. Executed dealings had by third persons with the agent in good faith and in ignorance of his insanity are not affected by it, where no advantage has been taken of it, and the parties cannot be restored to their original situation.

(g) Termination of authority by bankruptcy of the agent.

According to the English and American laws, the bankruptcy of a business agent, as for, example an agent, appoin-

1. *Raghunall v Lachmandas*, 38 I. C. 278 (Cal.) *Rhagvirath v Prem Chand* 16 I. C. 852 (Cal.) the presumption is that the agency is joint & several.
2. *Davidson v Forrest*, 35 Ill. App. 126.
3. See *Raven, An. re*, 76 U. J. Ch 218; *Mechem*, S. 978.
4. See ss 194, 193 & 210 of the Indian Contract Act, 1872.
5. S. 194, Indian Contract Act 1872.
6. *Smith v White & Dana* (Ky) 876.
7. See S. 184, Indian Contract Act, 1872 and notes on page 65.
8. *Katkar* pp 422, 428 and the authorities cited therein.
9. See S. 210, Indian Contract Act 1872.

ted to sell, or to buy, or to receive payment of money due to his principal operates as a revocation of his authority, but not where his authority is merely to do some formal act, as the execution of a deed, in the name of his principal, or the carrying out of some existing trust which is incumbent upon him.¹ Under the Indian law, however, the position appears to be different, and the mere fact that the agent has been adjudicated insolvent does not per se seem to cause the authority to terminate.² But although in Indian law adjudication of the agent as insolvent does not itself operate as a legal cause of termination of authority yet it may give the principal, in cases of business agents, where credit plays an important part and is generally a consideration for his engagement as agent a sufficient excuse for withdrawing his authority.³

101. Termination of agency by destruction or extinguishment of the subject-matter.

Where the authority is created to be exercised upon or respecting some particular subject-matter, whose continued existence is essential to the exercise of the authority, the subsequent destruction of that subject-matter must ordinarily operate to terminate the authority. For instance, the destruction of a house by fire terminates an authority to sell it.⁴ The subject-matter of agency is that upon or in respect of which the authority is to be exercised, and it means and includes every interest and only such interest which the principal has in a particular thing or in the performance of a particular act, which is entrusted to the agent or which it is the part of his business to perform. So the termination or extinguishment of the principal's interest in the subject-matter, over or concerning which the authority is to be exercised operates to terminate the authority.⁵ So also where the principal's power of appointing agents is derived from his occupying an office or position of a fiduciary character, his ceasing to occupy such office or position operates to determine the authority of those also who were his subordinates in the performance of the trust.⁶ Thus, in the case of an employment of an under-broker by a broker for a fixed term, if the services of the broker are dispensed with in the interval, the defendant's contract of under-brokerage is also dissolved and the under-broker is not entitled to sue the broker for damages for wrongful dismissal unless the broker had brought about the termination of hired agency possibly. Where the principal causes the destruction of the subject-matter of agency by his own act or omission he may be held liable to the agent to make good any loss which may result to him by such destruction and to which he would

1. See Katar, p. 433 and the authorities cited therein.

2. See S. 201, Indian Contract Act, 1872.

3. S. 205, Indian Contract Act, 1872. Katar, pp. 423, 424.

4. Mechem, § 697; Bowstead, Art. 189, p. 831, Story § 499; *Norley v. Trebilcock*, 7 Com. Cas. 201; *Mead v. Dawson*, 3 A. & E. 803; *The Agra City*, 79 E.T. 307.

5. See *Foster v. Bookbinder*, 152 N.Y. 166.

6. See Mechem, § 699.

7. *Lachmandas v. Raghumal*, 47 Cal. 2 50 P. O.

have been entitled had the termination of authority been brought about by the express or implied revocation of it by the principal himself.¹

102. Termination by the happening of any event which renders the agency unlawful.

Agency which was lawful in its inception may become unlawful by the happening of subsequent event. The most prominent examples of such events are:—

- (1) Change of law rendering the object of agency unlawful;
- (2) War between the nations of the principal and agent;
- (3) Marriage of the principal or agent in certain cases.²

An example of the first is of the agency created for the sale of certain commodities, the sale of which is subsequently prohibited by law, or where agency is created for the export of certain goods to a foreign country, the export of which is contrabanded.³

Similarly, the breaking out of the hostilities between the nationalities of the parties renders the continuance of the agency unlawful. Every kind of trading, or commercial dealing, or intercourse, whether by transmission of money, or goods or of orders for the delivery of goods either between the two countries at war, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission are prohibited.⁴ The breaking out of the hostilities between the state or country of the principal and that of the agent, as a general rule, renders further prosecution of the agency for such purposes unlawful and operates to dissolve the relation.⁵

Marriage of the principal may in certain cases, also operate to revoke a power previously given, where the execution of the power would defeat or impair rights acquired by the marriage.⁶ The application of this rule, however is limited only to the cases where the execution of the authority would defeat or impair the rights of the other party to the marriage, acquired by such marriage, and does not extend to the cases where they are not so defeated or impaired.⁷ Marriage of the agent may also operate to revoke the authority but only in those cases where consistently with the married life and with a full discharge of the duties which such life imposes, it becomes legally impossible for the agent to discharge the duties which the execution of the authority demands.⁸

1. *Lachmandas v. Raghunath*, 47 Cal 290 P C

2. See Mechem, §§ 692 to 700

3. See Mechem, § 700, Bowstead, Art 199, p. 991

4. *Williams v. Paine*, 169 U. S. 55.

5. Mechem, §. 694; See also *Insurance Co v Davis*, 24 L. Ed 453. cited in *Katlar*, p. 426.

6. Mechem, § 692.

7. *Joseph v. Fisher*, 122 Ind. Ind 399; *Katlar*, pp 426, 429

8. See *Edgcomb v. Buckhout*, 29 L. R. A. 916.

Besides the causes enumerated above, the exercise of an authority may be rendered unlawful by many other causes and wherever it is so it operates as a termination of the relation of the principal and agent. Attainder of the principal for high treason¹ and appointment by a court of a receiver to manage his affairs² have been held as sufficient cause to terminate the agency. So, where a person acted as agent of a revolutionary government, which afterwards ceased, it was held that he either had ceased to be an agent or had become of the new government by sufferance.³

Other causes.

A power given by way of security, or one coupled with an interest, like the power of sale contained in a valid mortgage, or a power to confess judgment, or to sell land and give receipt for the purchase money given to an attorney is not affected by the principal being subsequently married⁴ or declared an alien enemy.⁵

Authority coupled with an interest not affected.

¹ See *A G v Gradyll*, 145 E R 607

² See *Reid v Explosives Co*, 19 Q B D 264

³ *Two Societies v Wilcor*, 61 E R 116

⁴ *Tingley v. Muller*, (1917) 2 Ch 144

⁵ *Ennerl v Clark*, 44 Am Dec 191

APPENDIX A.

THE INDIAN CONTRACT ACT, 1872 (Act IX of 1872)

Chapter X (AGENCY).

Appointment and Authority of Agents.

'Agent' and
'principal'
defined.

S. 182. An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal".

(Cited at p. 12.)

Synopsis

Contractual obligations-p. 1; Agency-p. 3; Law of Agency-p. 5; English law how far helpful in interpreting the Law of Agency in British India-p. 8; History of the Law of Agency-p. 8; "Principal" and "Agent"-definition-p. 12; An agent distinguished from an ordinary servant-p. 14; An agent distinguished from an independent contractor-p. 16; An agent distinguished from a trustee-p. 19; An agent to buy or sell distinguished from vendor or purchaser-p. 21; Agency distinguished from partnership-p. 28; Agent distinguished from arbitrator-p. 31; Agency distinguished from other possessory rights-p. 31; Agent advancing money in the business of agency distinguished from a mere creditor-p. 32; An agent distinguished from a mere messenger or a person used merely as a mechanical aid or instrument-p. 33; Nomenclature of parties not conclusive evidence of relationship-actual facts must be looked into-p. 34; Held to be agents-p. 35; Different classes of agents-p. 42; Special agents and General agents-p. 42; Universal agents-p. 43; Mercantile agents-p. 43; Factors-p. 44; Brokers-p. 44; Auctioneers-p. 47; Del Credere Agent-p. 48; Arhatias-p. 50; In relation to ships-p. 51; Master of ship-p. 51; Shipbroker-p. 52; Ship's husband-p. 52; Bankers-p. 52;

Who may
employ agent.

S. 183. Any person who is of the age of majority according to the law to which he is subject and who is of sound mind, may employ an agent.

(Cited at p. 55).

Synopsis

Who may employ agent-p. 55: Only major and of sound mind can employ an agent-p. 55; Minor principal-p. 55; Incompetency due to unsound mind-p. 59; Contract in lucid interval-p. 61; Guardian of a minor or a committee or manager of a lunatic-p. 62; Persons otherwise disqualified from contracting--married women-p. 63; Drunkenness-p. 64; Alien enemy-p. 64.

Who may be
an agent.

S. 184. As between the principal and third persons any person may become an agent, but no person who is not of age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

(Cited at p. 65).

Synopsis.

Who may be an agent-p. 65; Minor or person of unsound mind as agent-p. 65; Personal liability of the agent minor or of unsound mind-p. 66; Personal disqualification to act as agent-p. 67; One agent for both parties-p. 68; Government whether can act as agent of its subjects-p. 68; Questions as to where agent a person is-p. 68; Agencies which require special qualification-p. 69.

S 185. No consideration is necessary to create an agency.

Consideration not necessary.

(Cited at p. 70)

Synopsis.

Consideration for agency not necessary-p. 70; How the relation of agency may be constituted-p. 70; No particular form of agreement necessary-p. 71; Consent of both principal and agent required to constitute an agency-p. 71; Agency by express appointment by the principal-p. 72; Appointment to be in writing when so required by the statute under which the agent to act-p. 72; Authority to execute a deed must be conferred by a deed-p. 73; Appointment not necessary in writing even though the contract to be entered into by agent to be in writing-p. 74; Appointment by corporations-p. 75; Agency by implication or estoppel-p. 77; Agency by estoppel: holding out-p. 80; Implication from situation-p. 86-father and son (p. 86); husband and wife (p. 87); an agent of necessity (p. 97); Agency by subsequent ratification (p. 101);

S. 186. The authority of an agent may be expressed or implied.

Agent's authority may be expressed or implied

(Cited at p. 102.)

Synopsis

Agent's authority may be expressed or implied-pp. 102, 103; Agent's authority- general (p. 102).

S. 187. An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written or the ordinary course of dealing, may be accounted circumstances of the case.

Definitions of express and implied authority

ILLUSTRATION

A owns a shop in Serampur living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

(Cited at p. 104).

Synopsis.

Definition of express and implied authority—p. 104; Implied authority of husband and wife—pp. 87 to 94.

S. 188. An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

Extent of agent's authority.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations.

- (a) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.
- (b) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen for the purposes of carrying on the business.

(Cited at p. 105).

Synopsis.

"General" or "Special" authority-p. 106; Authority intentionally and directly conferred by some voluntary act of the principal-p. 107; Direct authority of an agent-p. 107; Incidental powers which naturally and ordinarily attend such acts as are necessary to give effect to the authority conferred-p. 107; Illustrations of special agent-p. 108. General agents-p. 110; Authority of broker-p. 111; Authority of auctioneer-p. 112; Authority of factors-p. 114; Authority of ship-master-p. 116; Authority of Legal Practitioners-p. 120; Authority of other professional agents-p. 124; Authority of Insurance Agents-p. 127; Implied authority of partners-p. 128; No implied authority of partner-p. 136; Implied authority of directors and agents of companies-p. 139; Authority of manager of business-p. 140; Authority of servants of railway companies-p. 140; Other miscellaneous cases-p. 141; Authority conferred by custom or usage-p. 146; Evidence of usage and custom-p. 147; Is knowledge of the usage necessary-p. 149; Instances of reasonable custom and usages-p. 154; Instances of unreasonable custom and usages-p. 155; Custom of trade in Bombay-p. 155; Bombay Silver Market-p. 155; Usage of the Bombay Market known as the *pakki adat system*-p. 156; *Pakki adat system*-p. 157; Lyallpur and Amritsar markets-p. 160; Usage of *kachhi adat system* in cotton business in Bombay market-p. 161; Authority inferred from an established course of dealings in the particular business-p. 161; Apparent authority-p. 165; Authority inferred from previous conduct of the principal-p. 167; Authority by estoppel-p. 167; Authority conferred by ratification-p. 170; Construction of authority generally-p. 171; Authority conferred in writing must be construed strictly-p. 171; Construction of general words-p. 171; The words must be looked at in connection with the context as well as with the general object of the power-p. 175; language used is to be construed in the light of the surrounding circumstances-p. 177; Parol evidence to show surrounding of the parties when admissible-p. 177; Construction of authority given in ambiguous terms-p. 179; Construction of authority not given under seal; Construction of powers of attorney-p. 180; Construction of verbal authority-p. 185; Construction of authority to sell land-p. 185; Construction of authority to purchase land-p. 193; Construction of authority to take land on lease-p. 198; Construction of authority to receive or make payments-p. 198; Construction of authority to borrow and pledge-p. 209; Authority to sell goods or other personal property-p. 211; Authority to manage business or landed property-p. 218; Authority relating to negotiable instruments-p. 223; Authority relating to arbitration-p. 230; Authorities relating to legal proceed-

agent-p. 232; Authority to receive process-p. 233; Authority to sign and verify pleadings-p. 235 Authority to make admissions-p. 236; Authorities to compromise-p. 238.

S. 189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Agent's authority in an emergency.

Illustrations

- (a) An agent for sale may have goods repaired if it be necessary.
 (b) A consigns provisions to B at Calcutta, with directions to send them immediately to C at Cuttack B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling

(Cited at p. 162.)

Synopsis

Authority by necessity or urgency-p. 162; Partner's authority in emergency-p. 165; Agent of necessity-pp. 97 to 101.

Sub-Agents

Delegation of authority by agent-p. 292; Meaning of term-p. 292; When agent may delegate his authority-p. 292; Trade usage or custom: delegation of authority-p. 296; Nature of business necessitating employment of sub-agent-p. 297; Where no discretion or skill required an agent may delegate authority-p. 298; Authority to employ sub-agents arising from unforeseen emergencies-p. 300; Agent's intention to appoint a sub-agent known to the principal at the time of his appointment, acquiescence of principal-p. 301.

S. 190. An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or from the nature of the agency, a sub-agent must, be employed.

When agent cannot delegate.

(Cited at p. 302.)

Synopsis.

When agent cannot delegate-p. 302; General rule against delegation-p. 292; Authority to do an illegal act cannot be delegated-p. 292; Judicial authority cannot be delegated-p. 295; Where against public policy authority cannot be delegated-p. 295;

S. 191. A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

"Sub-agent" defined.

(Cited at p. 303.)

Sub-agent defined-p. 303.

S. 192. Where a sub-agent is properly appointed the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

Representation of principal by sub-agent properly appointed.

The agent is responsible to the principal for the acts of the sub-agent:

Agent's responsibility for sub-agent.

Sub-agent's
responsibility.

The sub-agent is responsible for his acts to the agent, but not to the principal except in case of fraud or willful wrong.

(Cited at p. 304).

Agent's re-
sponsibility for
sub-agent ap-
pointed with-
out authority.

S. 193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

(Cited at p. 304).

Relation be-
tween princi-
pal and per-
son duly ap-
pointed by ag-
ent to act in
business of
agency.

S. 194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Illustrations.

- (a) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose B names C, an auctioneer to conduct the sale C is not a sub-agent, but is A's agent for the conduct of the sale.
- (b) A authorizes B, a merchant in Calcutta, to recover the moneys due to A from C & Co. B instructs D, a solicitor, to take legal proceedings against C & Co. for the recovery of the money D is not a sub-agent, but is solicitor for A.

(Cited at p. 304).

Agent's duty
in naming
such person

S. 195. In selecting such agent for his principal an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Illustrations.

- (a) A instructs B, a merchant, to buy a ship for him B employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy and is lost. B is not, but the surveyor is responsible to A.
- (b) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

(Cited at p. 309).

Synopsis.

When there is privity of contract between the principal and the sub-agent-substituted agent-p. 305; When the principal is bound by the acts of a sub-agent-p. 309; Agent's responsibility for sub-agent to the principal-p. 311; Agent's responsibility for sub-agent to third persons-p. 312; Agent's responsibility for sub-agent-p. 312; Agent's duty in naming person to act for the principal-p. 309; Principal's right to sue a sub-agent.

Joint-Principals and Joint-Agents. —***Synopsis.***

Joint-principals and Joint-Agents-p. 314; Partners-p. 315; Joint-tenants and tenants-in-common-p. 316; Clubs and other associations-p. 316; Owners-p. 321; Joint creditors-p. 322; Managing Committee-p. 323; Members of Committee-p. 323; Provisional Committee-p. 323; Joint-agents-p. 323; When authority of joint-agents survives-p. 324; Directors of companies-p. 323; Prima facie authority is only valid if executed by all the Joint-agents-p.

Ratification.

S. 196. Where acts are done by one person on behalf of another, but with his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Right of person as to acts done for him without his authority.
Effect of ratification.

(Cited at p. 240).

Synopsis.

Meaning of ratification-p. 240; Ratification differs from estoppel-p. 241; Conditions necessary for ratification-p. 242; Ratification must be on behalf of another-p. 242; The act or contract to be ratified must be unauthorised-p. 245; The transaction must be at the time when it is ratified-p. 245; Unconditional acceptance of the act by the assumed principal essential-p. 246; Ratification must not be partial-p. 246; Contracts made before incorporation of company-p. 243; Position of agent-p. 244; Who can ratify-p. 254; What acts may be ratified-p. 255; Acts void *ab initio* or *ultra vires* whether can be ratified-p. 256; Unlawful acts whether can be ratified-p. 257; Voidable acts whether can be ratified-p. 257; Only act of agent or would be agent can be ratified-p. 258; Criminal cases whether can be ratified-p. 259; Torts may be ratified-p. 259.

S. 197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Ratification may be expressed or implied.

Illustrations.

- (a) A, without authority, buys goods for B. Afterwards B sells them to C on his own account, B's conduct implies a ratification of the purchase made for him by A.
- (b) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

(Cited at p. 261).

Synopsis.

Ratification may be expressed or implied-p. 261; Implied ratification-p. 261; Ratification by a declaration or expression of approval-p. 263; By proceeding to perform the obligations arising thereunder-p. 263; By the acceptance of the benefits arising thereunder-p. 263; By bringing an action in a court of law-p. 267; By acquiescence-p. 268; Evidence of ratification-p. 274; Other illustration of implied ratification-p. 275; Express ratification-p. 277; Ratification of a written contract-p. 274.

(Cited at p. 246).

(Cited at p. 260).

Illustrations

- (Cited at p. 278).

(Cited at p. 592.)

Determination and revocation of agent's authority-p. 592;
Termination of agency by performance-p. 592; Termination of

happening of a contingency-p. 596; Termination of agency by mutual consent-p. 597; Termination of agency by revocation of authority by the principal-p. 597; Termination by renunciation of the business of agency by the agent-p. 613; Form of renunciation-p. 614; When the agent may lawfully renounce-p. 615; Termination by death of the principal-p. 616; Termination by insanity of the principal-p. 619; Termination by bankruptcy of the principal-p. 620; Termination of authority by the death of the agent-p. 621; Sub-agents-p. 622; Termination of authority by insanity of the agent-p. 622; Termination of authority by bankruptcy of the agent-p. 622; Termination of agency by destruction or extinguishment of the subject-matter-p. 623; Termination by the happening of any event which renders the agency unlawful-p. 624.

S. 202. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Termination of agency where agent has an interest in subject matter

Illustrations.

- (a) A gives authority to B to sell A's land and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death
- (b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and repay himself out of the price, the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

(Cited at p. 605)

Synopsis.

When authority is irrevocable - p. 605; Factors for sale of goods-p. 609; Authority coupled with an obligation-p. 610; Authority and interest must emanate from the same source-p. 612; Express language as to irrevocability-p. 612;

S. 203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal may revoke agent's authority

(Cited at p. 597)

Synopsis.

When principal may revoke agent's authority-p. 597; What amounts to exercise of authority-p. 598; Distinction between the right to revoke and the power to revoke-p. 598; Damages payable to agent-p. 598;

S. 204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation where authority has been partly exercised

Illustrations

- (a) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.
- (b) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's money remaining in B's hands. B buys 1,000 bales of

cotton in A's name and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

(Cited at p. 609)

Synopsis

Revocation where authority has been partly exercised-p. 609 ;

Compensation
for revocation
by principal
or renuncia-
tion by agent

S. 205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

(Cited at p. 595).

Synopsis.

Compensation for revocation by principal or renunciation by agent-p. 595 ; Damages payable to agent-p. 598 ;

Notice of re-
vocation or
renunciation

S. 206 Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

(Cited at p. 601).

Synopsis.

Notice of revocation where necessary-p. 601 ; Form of notice-p. 603 ;

Revocation
and renuncia-
tion may be
expressed or
implied

S. 207 Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration.

A employs B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

(Cited at p. 599).

When termi-
nation of
agent's autho-
rity takes
effect as to
agent, and as
to third
persons

S. 208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him or so far as regards third persons, before it becomes known to them.

Illustrations.

- (a) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.
- (b) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money with which B absconds. C's payment is good as against A.
- (c) A directs B, his agent to pay certain money to C. A dies and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

(Cited at p. 608).

Synopsis.

Time from which revocation operates-p. 603; Acts done after revocation how far valid-p. 604.

S. 209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's duty on termination of agency by principal's death or insanity

(Cited at p. 621).

S. 210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him

Termination of sub-agent's authority

(Cited at p. 600).

Synopsis

Termination of sub-agency on cancellation of original contract-p. 600.

Agent's duty to principal.

Rights and duties relative terms - p. 328, The principal, the agent and the third person- p. 329; Duties of the agent to his principal-p. 329; Effect of usage or custom-p. 330; Nature and extent of the fiduciary duties- p. 330.

S. 211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Agent's duty in conducting principal's business

Illustrations.

- (a) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments
- (b) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A

(Cited at p. 331.)

Synopsis

To follow the directions of the principal and in their absence the custom of the business-p. 331; Departure from instructions-p. 335; Custom of trade-p. 335.

S. 212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence and to use such skill as he possesses; and to make compensation to his principal in respect of the direct

Skill and diligence required from agent

consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

Illustrations.

- (a) A, a merchant in Calcutta, has an agent, B, in London to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss as e.g., by variation of rate of exchange—but not further.
- (b) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.
- (c) A, an insurance-broker, employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the under-writers. A is bound to make good the loss to B.
- (d) A, merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

(Cited at p. 335).

Synopsis.

Agent to exercise skill and diligence - p. 335; Agent acting gratuitously and one acting for reward - p. 337; Sub-agent - p. 341; Negligence and gross negligence - p. 341; *Damages for violating obligations to principal* - p. 342; When actual damage need not be proved - p. 343; Agent can show that principal suffered no real damage - p. 344; Agent can show that loss is inevitable - p. 344; Measure of damages - pp., 342, 344; Principal entitled to recover compensation paid to third parties - p. 345; Agent entitled to rectify his mistake - p. 346; Measure of damages for negligence and other breaches of duty - p. 346; Measure of damages for fraud of agent - p. 347; Conversion by agent - p. 348; Agent not liable for remote loss - p. 348; Loss of profits - p. 349; Actual loss may vary - p. 349.

Agent's
accounts

S. 213. An agent is bound to render proper accounts to his principal on demand.

(Cited at p. 384).

Synopsis.

Agent's duty to render proper account to the principal - p. 384; Difference between the English & Indian law on the subject - p. 385; Agent liable to account to principal only - p. 385; Duty of partners to account - p. 386; Duty of a Karta of a Joint family to account - p. 387; Duty of promoters to account - p. 387; Duty of a factor to account - p. 388; What is meant by rendition of account - p. 388; Time for rendering account - p. 391; Mode of taking the account - p. 392; Re-opening of settled accounts

when allowed-p. 395; Time from which account should be re-opened-p. 396; Difference between the re-opening of the account and giving the principal leave to surcharge and falsify the account-p. 399; Who can claim accounts-p. 400; Accounting in case of joint principals-p. 403; What the accounts should include-p. 404; How far agent bound by his own accounts-p. 404; Principle of equity in suits for accounts-p. 406; When account suit not maintainable-p. 408; Converting money suit into account suit-p. 408; Res Judicata-p. 408; Place of cause of action-p. 409; Limitation-p. 409; Periodical accounts-p. 409; Express contract not necessary for liability to account-p. 409; Disputing principal's title-p. 409; Agent remunerated by salary-p. 409; Form of suit-p. 409.

S. 214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions

Agent's duty to communicate with principal

(Cited at p. 350).

Synopsis.

To seek instructions of the principal in cases of difficulty and to follow them-p. 350; Result of disobedience of instructions-p. 351.

S. 215. If an agent deals on his own account in the business of the agency without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Right of principal when agent deals on his own account in business of agency without principal's consent

Illustrations

- (a) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.
- (b) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

(Cited at p. 352).

Synopsis.

Agent's duty not to deal in the business of the agency on his own account-p. 352; Right of principal when agent deals on his own account in business of agency without principal's consent-p. 352.

S. 216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal the principal, is entitled to claim from the agent any benefit which may have resulted to him from the transaction

Principal's right to benefit gained by agent dealing on his own account in business of agency

Illustration

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering

that B has bought the house, compel him to sell it to A at the price he pays for it.

(Cited at p. 354.)

Synopsis.

Principal's right to benefit gained by the agent dealing on his own account in business of agency-p. 354; Agent becoming seller or purchaser-p. 355; Fairness of unfairness or transaction how far material-p. 357; Agent lending own money-p. 367; Brokers-p. 358; No approbating and reprobating-p. 358; Principal's rights to profits-p. 358; Secret profits made by agent-p. 362; profits not acquired in course of agency-p. 364; Forfeiture of commission-p. 364; Knowledge of Principal-p. 364; Exception to the general rule-p. 365; Custom or usage to the contrary-p. 366; Unauthorized profits of agents-p. 367; payments authorized by custom-p. 367; Agreements against the agent's duty are void-p. 368; Agents dealing with the principal himself-p. 369; Gifts to agents-p. 371; Agent purchasing property becomes a trustee.

Agent's right of retainer out of sums received on principal's account

S. 217 An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

(Cited at p. 378).

Synopsis.

Deduction which the agent is allowed to make-p. 378; Agent's right to remuneration founded on express or implied contract p. 417; Express agreement conclusive-p. 418; Implied contract-p. 419; Commission only on transactions directly resulting from the agency-p. 422; Agent must have done what he was employed to do-p. 426; Work must be done in reasonable time-p. 426; Agent must have acted as agent to entitle him to remuneration-p. 426; Work must have been done as work in the agency-p. 427; Agent must have done work himself-p. 427; Work must be properly done to earn commission-p. 427; Mere taking trouble does not entitle agent to remuneration-p. 428; Principal not bound to accept disadvantageous terms-p. 428; Remuneration may be payable even though the principal acquires no benefit-p. 428; Special contract making remuneration only payable if agent's services profitable to principal-p. 431.

Agent's duty to pay sums received for principal

S. 218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

(Cited at p. 374)

Synopsis.

Agent's duty to pay the principal all the sums received on the principal's account-p. 374; Payment in respect of void or illegal transactions-p. 375; Other cases-p. 376; Exceptions-p. 377; Agent of joint principals-p. 377; Accounting by joint agents and sub agents-p. 378.

S. 219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold or, although the sale may not be actually complete.

When agent's remuneration becomes due

(Cited at p. 432).

Synopsis.

When agent's remuneration becomes due-p. 432; Agent for sale (brokers)-p. 433; Broker for negotiating lease-p. 437; Clerk's remuneration when services left without consent-p. 437; Life Assurance companies-p. 437; Damages for wrongfully preventing agent from earning remuneration-p. 438; No remuneration in respect of unlawful or wagering transactions-p. 441; No remuneration in cases of misconduct or breach of duty-p. 442.

S 220 An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Agent not entitled to remuneration for business misconducted

Illustrations

- (a) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees B is entitled to remuneration for recovering the 1,00,000 rupees and for investing the 90,000 rupees He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B [So in the Act but it should obviously be A]
- (b) A employs B to recover 1,000 rupees from B Through B's misconduct the money is not recovered B is entitled to no remuneration for his services, and must make good the loss

(Cited at p. 445).

Synopsis

Agent not entitled to remuneration for business misconducted-p. 445; When agent can recover for extra services-p. 445; Quantum meruit-p. 446

S. 221 In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property whether moveable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him

Agent's lien on principal's property

(Cited at p. 463).

Synopsis.

Lien defined-p. 463; Possessory lien of agents-p. 464; Banker's lien-p. 465; Factors-p. 466; Wharfingers-p. 468; Creditor advancing money on the godown system-p. 468; Attorney's lien-p. 468; Conditions of agent's lien-p. 471; The property must be in the possession of the agent-p. 471; The possession must be lawful-p. 472. The possession of property must be acquired in the same capacity as that in which the lien is claimed-p. 472; Lien of an agent confined to what is due to him as such-p. 473; Must be no agreement inconsistent with the lien-p. 473; No lien on property intrusted to agent for special pur-

not inconsistent therewith-p. 474; Waiver of the right-p. 476; Lien confined to rights of principal-p. 476; Money and negotiable instruments excepted-p. 478; Sums for which lien can be claimed-p. 479; Agent's right of stoppage in transit-p. 479; Lien of sub-agent-p. 480; Ratification of acts of the sub-agent by the principal-p. 482; How an agent's lien may be enforced-p. 482; How lien lost or extinguished-p. 483; How far lien effective against third persons-p. 485.

Other Duties of Agents

Synopsis.

Agent's duty to perform his undertaking-p. 352; Agent must not use material or information acquired in course of agency-p. 373; Liability to pay interest when arises-p. 379; Agent's duty to present correct accounts-p. 380; Effect of mingling principal's property with his own-p. 381; Mode of keeping accounts-p. 382; Principal's right to inspect the agent's accounts-p. 383; Agent's duty not to deny the principal's title to the property entrusted to him as agent-p. 409; Duties of particular classes of agents-p. 412; Auctioneers-p. 413; Brokers-p. 415.

Principal's Duty to Agent.

Agent to be indemnified against consequences of lawful acts

S. 222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Illustrations.

- (a) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.
- (b) B, a broker at Calcutta, by the orders of A a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessful and has to pay damages, and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

Synopsis.

Agent's rights of reimbursement and indemnity against the principal-p. 447; Law in India: Agent to be indemnified against consequences of lawful acts-p. 449; C. i. f. contract with commission agent-p. 450; No indemnity in respect of any act or transaction which is unlawful obviously or to the knowledge of agent-p. 452.

Agents to be indemnified against consequences of acts done in good faith

S. 223. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Illustrations.

- (a) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by B, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to B, in consequence of obeying A's directions.

by B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of, B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

(Cited at p. 455).

Synopsis

Principal's duty to indemnify-p.455.

S. 224 Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Non-liability of employer of agent to do a criminal act

Illustrations

- (a) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay damages to C for so doing. A is not liable to indemnify B for those damages.
- (b) B, the proprietor of a newspaper, publishes, at A's request a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages, of any action in respect thereof. B is sued by C, and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

(Cited at p. 455).

Synopsis

The loss or liability must be a direct consequence of the execution of the agency-p. 457; Acts not authorised by the principal or not subsequently satisfied by him-p. 458; Lack of authority due to principal's default-p. 460; No indemnity in consequence of agent's own negligence, default, insolvency, or breach of duty-p. 460

S. 225 The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Compensation to agent for injury caused by principal's neglect

Illustration

A employs C as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.

(Cited at p. 461.).

OTHER DUTIES OF THE PRINCIPAL TO HIS AGENT

Synopsis

Principal's duty to keep the agent employed according to the terms of the contract-p. 447; Rights of agents in respect of the goods bought by him in his own name-p. 486; Right of agent to interplead-p. 486; Right of agent to an account-p. 487; Agent's right of retainer out of sums received on principal's account-p. 487; Agent has no right to sue principal on contracts entered into on his behalf-p. 487.

Effect of agency on contract with third persons.

S. 226 Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Enforcement and consequences of agent's contracts

Illustrations

- (a) A buys goods from B, knowing that he is an agent for their sale but not knowing who is the principal. B's principal is the person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt to himself from B.
- (b) A, being B's agent with authority to receive money on his behalf receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

(Cited at p. 489).

Synopsis

What acts of agents bind their principals-p.489; Acts within actual or apparent scope of authority-p.489; Express authority p.490; General authority-p.490; Authority by estoppel-p.490; Fraudulent notice of agent immaterial-p.494.

Principal how far bound when agent exceeds authority

S. 227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority, is binding as between him and his principal.

Illustration

A, being owner of a ship and cargo authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

(Cited at p. 515.)

Principal not bound when excess of agent's authority is not separable

S. 228. Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction.

Illustration

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

(Cited at p. 515)

Synopsis

Duty of the third person to ascertain the authority of the agent-p. 516; Principal's liability when the agent exceeds the authority-p. 517; Limited authority of the agent-p. 520; Private instructions-p. 520; Notice of excess of authority-p. 521; Equitable obligation of principal for benefit derived-p. 522.

Consequences of notice given to agent

S. 229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Illustrations

- (a) A is employed by B to buy from C goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D, but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.

(b) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set off against the price of the goods a debt owing to him from C.

(Cited at p. 510).

Synopsis

Notice to the agent when and how far equivalent to notice to principal-p. 510.

S. 230. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Agent cannot personally enforce, nor be bound by contracts on behalf of principal

Such a contract shall be presumed to exist in the following cases :—

Presumption of contract to contrary

- (1) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :
- (2) Where the agent does not disclose the name of his principal :
- (3) Where the principal, though disclosed, cannot be sued.

(Cited at p. 523.)

Synopsis

Agent acting as principal-p. 523 ; Agent when can sue-p. 524 ; Contract to the contrary-p. 524 ; Joint Hindu family-p. 526 ; Agency coupled with interest-p. 526 ; Right of agent to sue for money paid by mistake etc. p-527 ; Presumed exceptions. Foreign principal-p. 527 ; Principal undisclosed-p. 528 ; Brokers-p. 531 ; Negotiable instruments-p. 531 ;, Pro-note executed by guardian-p. 533 ; Benamidar pro-note holder-p. 533 ; Principal not liable-p. 534 ; Deed executed in agent's name-p. 534 ; Sovereign States as principals-p. 534 ; Defendant's right where agent sues in his own name-p. 534 ; Effect of settlement with principal-p. 535.

S. 231. If an agent makes a contract with a person who neither knows nor has reason to suspect, that he is an agent, his principal may require the performance of the contract ; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

Rights of parties to a contract made by agent not disclosed

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

(Cited at p. 535).

S. 232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the

Performance of contract with agent supposed to be principal

rights and obligations subsisting between the agent and the other party to the contract.

Illustration

A, who owes 500 rupees to B, sells 1,000 rupees, worth of rice to B A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case C cannot compel B to take the rice without allowing him to set-off A's debt.

(Cited at p. 536.)

Synopsis.

Equities between agent and third party-p.538.

S. 233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Right of person dealing with agent personally liable

Illustration

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C A may sue either B or C, or both, for the price of the cotton

(Cited at p. 539.)

Synopsis.

Suit against principal and agent jointly or alternatively-p. 539; Creditor's election-p. 540.

S. 234. When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Consequences of inducing agent or principal to act on belief that principal or agent will be held exclusively liable

(Cited at p. 543.)

S. 235. A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Liability of pretended agent

(Cited at p. 556.)

Synopsis.

Representation may be implied-p. 571; Representation must be effective-p. 571; Agent assuming authority-p. 571; Representation on a point of law-p. 572;

S. 236. A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

Person falsely contracting as agent not entitled to performance

(Cited at p. 574.)

Synopsis

Principal fictitious or non-existent-p. 575.

S. 237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Liability of principal inducing belief that agent's unauthorized acts were authorised.

Illustrations

- (a) A consigns goods to B for sale, and gives his instructions not to sell under a fixed price. C, being ignorant of A's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.
- (b) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

(Cited at p. 516.)

Synopsis

See under section 228.

S. 238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Effect on agreement, of misrepresentation or fraud by agent

Illustrations

- (a) A being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.
- (b) A, the captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignee.

(Cited at p. 502.)

Synopsis

Misrepresentation by principal or agent where agent or principal has knowledge of the true facts-p. 504; money etc. misappropriated by agent-p. 504; Money etc. received by or applied for benefit of, principal-p. 504; Crown not liable for wrongs of public agent-p. 505; Corporations-p. 505; Trade Unions-p. 507; Effect of judgment in tort against principal or agent: contribution-p. 507; misrepresentation by agent as to credit, etc. of third persons-p. 507.

Other Matters-Synopsis

Liability of the principal for wrongs of agent-p. 496; Torts committed by the agent-p. 496; Act done during course of employment-p. 502; Admissions by agents-p. 508; Agent's admissions when evidence against the principal-p. 508; Rights of principal in respect of property intrusted to an agent-p. 544; Right to follow property into hands of third persons-p. 544; Privilege from distress of goods and chattels in hands of agent-p. 544; Bribery of agents-p. 545; Rights of principal where agent bribed-p. 545; Rights and liabilities of the principal on contracts made by agent-p. 546; Crown may sue or be sued

on contracts made by public agent-p. 546; Principal may sue or be sued in his own name-p. 546; Foreign principals-p. 548; Deeds-p. 548; Effect of particular customs or usages-p. 548; Dealings with money and negotiable securities-p. 548; Settlement between principal and agent affecting rights of principal-p. 549; Fraud, misrepresentation, or knowledge of agent may be set up in an action by the principal-p. 550; Settlement with or set off against agent affecting rights of principal-p. 551; Right of set off-p. 552; Where the agent has a lien-p. 554; Payment to or settlement with agent-p. 554; Principal's liability for agent's criminal acts-p. 555; Criminal liability-p. 556; Liability of agents in respect of contracts made by them-p. 558; Agent's liability by contract to third party-p. 559; Auctioneer-p. 560; Construction of contracts to ascertain the liability of the agent-p. 562; Admissibility of parol evidence of intention-p. 564; Verbal contracts-p. 565; Effect of judgment against principal-p. 565; Agent shown to be the real principal p. 565; Liability of the agent when the principal is a corporation-p. 565; Liability of public agents for acts done and contracts entered into on behalf of the State-p. 566.

APPENDIX B.

THE POWERS-OF-ATTORNEY ACT, 1882. (ACT NO. VII OF 1882.)

An Act to amend the law relating to Powers-of-Attorney.

For the purpose of amending the law relating to Powers-of-Attorney ; It is hereby enacted as follows:—

1. This Act may be called the Powers-of-Attorney Act, 1882. It applies to the whole of British India ; and it shall come into force on the first day of May 1882.

Short title.
Local extent,
Commence-
ment

2. The donee of a power-of-attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and thing so executed and done, shall be effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of donor thereof.

Execution
under power-
of attorney

This section applies to powers-of-attorney created by instruments executed either before or after this Act comes into force.

3. Any person making or doing any payment or act in good faith, in pursuance of a power-of-attorney, shall not be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or insolvent, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, insolvency or revocation was not, at the time of the payment or act, known to the person making or doing the same.

Payment by
attorney
under power,
without
notice of
death, etc.,
good.

But this section shall not affect any right against the payee of any person interested in any money so paid ; and that person shall have the like remedy against the payee as he would have had against the payer, if the payment had not been made by him.

This section applies only to payments and acts made or done after this Act comes into force.

4. (a) An instrument creating a power-of attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the High Court within the local limits of whose jurisdiction the instrument may be.

Deposit of
original
instruments
creating
powers-of-
attorney

(b) A separate file of instruments so deposited shall be kept ; and any person may search that file and inspect every instrument so deposited; and a certified copy thereof shall be delivered out to him on request.

(c) A copy of an instrument so deposited may be presented at the office and may be stamped or marked as a certified copy, and, when so stamped or marked, shall become and be a certified copy.

(d) A certified copy of an instrument so deposited shall, without further proof, be sufficient evidence of the contents of the instrument and of the deposit thereof in the High Court.

(e) The High Court may, from time to time, make rules for the purposes of this section, and prescribing, with the concurrence of the Provincial Government, the fees to be taken under clauses (a), (b) and (c).

(f) * * * *

(g) This section applies to instruments creating powers-of-attorney executed either before or after this Act comes into force.

Power-of-
Attorney of
married
women

5. A married woman, whether a minor or not, shall by virtue of this Act, have power, as if she were unmarried and of full age, by a non-testamentary instrument, to appoint an attorney on her behalf, for the purpose of executing any non-testamentary instrument or doing any other act which she might herself execute or do; and the provisions of this Act, relating to instruments creating powers-of-attorney, shall apply thereto.

This section applies only to instruments executed after this Act comes into force.

6. (*Act XXVIII of 1866, s. 39, repealed.*) *Rep by the Act, 1891 (XII of 1891).*

APPENDIX C

ADDENDA

(i) **An agent to buy or sell distinguished from vendor or purchaser (Article 10).**

Add before para 1 :—

Page 22

'The essence of sale is the transfer of the title to the goods for price paid or to be paid. The transferee in such case becomes liable to the transferor of the goods as a debtor for the price to be paid and not as an agent for the proceeds of the re-sale. The transferor is not concerned with any subsequent fluctuations in price and loss or gain to the goods. The essence of agency to sell is the delivery of the goods to a person who is to sell them, not as his own property but as the property of the principal who continues to be the owner of the goods and therefore entitled to control their sale, as for instance, to fix their price, to dictate the terms of re-sale or to re-sell the goods. He cannot demand the price of the goods before re-sale but only such proceeds as accrue to him on such re-sale. Where by the terms of the contract between the Government of Mysore and a company, the company were appointed the selling agents of oil manufactured by the Government bound to keep regular books of accounts of all oil received or sold, to remit the sale proceeds less commission to the Government bankers and liable for all moneys recoverable on sales effected without raising any question of bad debts, and the Government had also the right to fix the minimum prices at which oil should be sold, by the agents, it was held that the contract between the parties was one of agency and not of sale.'

Sitaramchar v. Government of Mysore, 8 mys. L. J. 385.

(ii) **Nomenclature of parties not conclusive evidence of relationship-actual facts must be looked into (Article 16).**

Add after 'favouring buyer' in para 1:—

Page 35

'One who under an overriding contract undertakes to do his best to find a market for the manufacturer's stock, who is given some special advantages, such as a special discount or preference in complying with his orders, but who in each particular contract acts as a buyer from the manufacturer and sells at whatever price he can get, unless—as is sometimes the case—he is, by a special provision in the overriding contract, forbidden to sell too cheaply or required not to spoil the market by asking too much.

Agent's authority may be express or implied (Article 28).

Add at the end of para 1 on page 104:—

Pages 104
and 494

"The authority of an agent may, according to S. 186 be express or implied. When it is to be inferred from the circumstances of the case, things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case. Even if the agent has acted in excess of his actual authority the liability of the firm remains, if the contracting party has been led into an honest belief in the existence of the authority to the extent apparent to him. Even if fraud is committed by agent for his own benefit the firm is liable if the agent is acting within the scope of his implied authority."

Raja Sir Bissessardas etc v Kabulchand etc A I. R. 1945 Nag. 121; *Ram Pertap v. G. Marshall*, 26 Cal 701 P C; *Dinabandhu Saha v. Abdul Latif Molla*, A I. R 1923 Cal 157; *Barwick v. English Joint Stock Bank*, 2 Ex 259, *Lloyd v Grace, Smith & Co*, (1912) A C 716 & *Vurdhman Bros v Radhakishan Jaikishan*, A. I R 1924 Nag 79 relied upon

Relations between principal and sub-agent (Article 49).

Add before the last para —

Page 309-
S 195 Agent's
power to re-
voke nomina-
tion of substi-
tuted agent

S 195 of the Contract Act implies the power of revocation in an agent in the case of a substituted agent. It cannot be said that because the agent is responsible to the principal for negligence in the selection of a substituted agent his hands would be tied as soon as he made the nomination and that the principal alone can revoke the nomination

Ramchandra Lalbai v Chinubhai Lalbai. A I R 1944 Bom 76=214 I C 42

Liability to pay interest when arises (Article 63)

Add before Article 64

Page 380

"There is nothing in Ch 10 Contract Act, which deals with "agency" to support the claim of interest by the principal against the agent in respect of amount received by the agent for the use of his principal. Under the English law which may be guide when the Contract Act is silent no agent is liable to pay interest upon money received by him to the use of his principal, except where he receives or deals with the money improperly, and in breach of his duty or refused to pay it over to the principal on demand.

The co-sharers who were the members of a Mohammadan family executed a deed by which one of them was appointed a mutwalli and was authorised to collect the debts due to the family and distribute the same among the co-sharers according to their shares. No provision was made for the payment of interest. The mutwalli having failed to make the payments the executants co-sharers brought a suit against the mutwalli to recover the amounts that may be found due to them out of the realisations made by the mutwalli. The plaintiffs also claimed interest on the amounts sought to be recovered :—

Held that (1) the position of the mutwalli was that of

(2) as the mutwalli did not distribute the money when realised the case was one of mere detention of money ;

(3) therefore in the absence of any demand by the plaintiffs the mutwalli was not liable to pay interest for the period before the institution of the suit.

Chaudhury Mohammad Bux v. Chaudhury Zahrul Haq, A. I. R. 1945 Pat 196; *Turner v. Burkinshaw*, (1867) 2 Ch.A. 488, relied on.

Agent's duty to render proper account to the principal (Article 65).

Add before para 1:—

'When an agent dies without rendering account to his principal, his estate in the hands of his legal representative is liable for whatever may be found due to the principal on account; the principal can file a suit for an account against the legal representative for the determination of the amount due from the deceased agent, but the legal representative cannot be called upon to render an account in the technical forensic sense in which the agent himself would be liable in an ordinary suit for rendition of accounts. In such a suit filed by the principal against the deceased agent's legal representative the burden of proof primarily lies upon the plaintiff, and it is for the court to take an account on such materials as are laid before it by the parties and determine what amount, if any, was due to the plaintiff from his deceased agent.'

Agent dying without rendering accounts—liability of legal representative.
Page 403

Purshottam Vasudeo v. Ramkrishna Gorind, A. I. R. 1945 Bom. 21—(Case law discussed).

Agent's right to remuneration (Article 68).

Add before para 1:—

'The plaintiff, a commission agent, introduced the defendants, agents of a German manufacturing firm, to the management of a cotton mill, K, and as a result a contract was entered into under which the German Firm was to sell, and the cotton mill was to buy two sets of cotton spinning machinery packed and delivered F. O. B. Hamburg. In consideration of the same the defendants' manager wrote a letter to the plaintiff undertaking to pay the latter a sum of Rs. 6000— "after the satisfactory expiry and conclusion of the K. business." Subsequently, as the cotton mill K was not in a position to pay for the two sets of machinery contracted for, further negotiations took place and a fresh contract was entered into under which the manufacturers were to supply only one set of machinery, and this contract was duly fulfilled. The plaintiff sued the defendants for Rs. 6,000 on the basis of the letter written to him by the defendants' manager. The defendants resisted the claim on the ground that the first contract had not been carried through, but admitted their liability for Rs. 3,000 in respect of the second contract.

Page 437
Commission agent—introduction of buyer to seller resulting in contract for sale and purchase—undertaking to pay commission "after satisfactory expiry and conclusion of the business"—meaning of

Held, that the words "after the satisfactory expiry and conclusion of the K business", in the letter of the defendants'

manager, meant payment only after the completion of the contract, and the "satisfactory expiry and conclusion" of that contract would take place only after the goods had been shipped and the buyer had paid for them against delivery of the shipping documents or of the goods; and as that contract was not fulfilled the plaintiff was not entitled to claim the full amount of Rs. 6,000.

Chinnaswami v C. Doctor & Co. A. I. R. 1944 Mad. 546.

Agent's right to remuneration Article 68).

Add after para 1:—

A broker who is employed by a seller to introduce him to a prospective buyer is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from that introduction. It may be a question whether a particular contract results from the introduction or not. Once the parties have as a result of the introduction been brought into business relationship by means of a contract then entered into, it may well be that a subsequent contract carries no commission for the broker because the subsequent contract is the fruit not of the introduction but of the satisfactory business relationship which the introduction established (second contract held resulted from introduction).

Valarshak Seth Apar v. Standard Coal Co. Ltd., A. I. R. 1943 P. C. 159 = 209 I. C. 132.

Liability of the principal for wrongs of agent (Article 74).

Add before para 4:—

'In a case of tortious act by agent under principal's direction, each is liable to party injured'.

London and Lancashire Insurance Co Ltd. V. Benoy Kiishna Mitra, 78 C. L. J. 129.

Admissions by agents (Article 75).

Add at the end of para 1:—

'The acts of a Government Officer bind the Government only when he is acting in the discharge of a certain duty within the limit of his authority, or if he exceeds that authority, when the Government in fact or in law, directly or by implication, ratifies the excess. Therefore an admission by an executive officer of a cantonment that a license of cantonment land has the ownership of the trees standing thereon, will not be binding on Government.'

Sujan Singh Ahluwalia v. Governor-General in Council, A. I. R. 1944 Pesh. 34.

Agent cutting trees for principal and using same later Agent not liable for price of trees to their owner. (*Ibid*).

Agent acting as principal (Article 78).

Add at the end of para 1:—

'A broker contracting as broker cannot sue or be sued personally whether principal was disclosed or not.'

Page 437
Broker employed for introducing buyer

Page 496

Page 510
Admissions by Government Officers

Page 576

Page 581

Jivraj Khimji v. Chainkaran, A. I. R. 1944 Nag. 279.

Responsibility of agent for the payment of money received by him for the use of third person (Article 87).

Add at the end of para 1 :-

Page 580

"Where a principal has allowed an agent to make payments of money for him, the knowledge of the agent must be imputed to the principal. In such a case the principal cannot be heard to say that he was acting under a mistake of fact when the agent who made the payment and who was permitted to do it, was aware of all the facts."

Shiva Prasad Singh v. Srischandra Nandi, A. I. R. 1943 Pat. 327=210 I. C. 426.

Determination and revocation of agent's authority (Article 90).

Add before Article 91 :-

Page 592
Duration of
agency-trans-
fer or assign-
ment

'An agency, unless it is for a fixed term, obviously continues and may be terminated at the pleasure of the principal. By its very nature it is personal, neither transferable nor assignable and depends entirely on the agreement made with the principal.

Premji Damodar v. L. V. Govindji & Co., A. I. R. 1943 Sind 197.

Modes of revocation (Article 95)

Add before para 1 :-

Page 603
Reasonable
notice

In *Sohrabji Dhunjibhoy v. Oriental Government Security Life Assurance Co. Ltd.*, in the case of a chief agent of an insurance company, a period of two years was held to be a reasonable notice of termination under S. 206 of the Indian Contract Act.

A. I. R. 1944 Bom. 166, cited at p. 437.

When authority is irrevocable (Article 97).

Add before para 1 :-

Page 607

'Section 202 of the Indian Contract Act is wide in its terms, but it makes no departure from the English law. Under this section, as under the English law, some specific connection must be shown between the authority and the interest, and there must also be an agreement, express or implied whereby the authority is given to secure some benefit which the donee is to obtain by reason of the authority.

Ramachandra Lalbhai v. Chinubhai Lalbhai, A. I. R. 1944 Bom. 76=214 I. C. 42.

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